

admit any guilt or enter any plea of guilty, but that at said pretended trial, the said Municipal Magistrate, as such and not otherwise, administered whatever oaths were administered to any witness.

That the said complaint was not verified or sworn to before any person having authority to administer an oath, nor was any written or verified charge under oath made against this petitioner at or prior to said pretended trial.

That a copy of Section 2 of Ordinance 27 referred to in the complaint, Exhibit 1, hereto attached, is hereto attached marked Exhibit 2, and hereby made a part hereof.

That the petitioner's imprisonment is wholly illegal and without cause or justification in law, in this, that the complaint above referred to is not verified before any person having authority to administer oaths, and that no complaint under oath has been filed or made against this petitioner.

That said complaint does not state facts constituting an offense of any kind or authorizing in any way the arrest or imprisonment of this petitioner. [2]

That the ordinance charged in said complaint to have been violated by the petitioner is null and void and without force and effect, in this, that the Common Council of the Town of Juneau, at the time of the alleged enactment of said ordinance had no authority to enact it or to declare any of the acts therein enumerated a crime or offense punishable by imprisonment or otherwise.

That the common council since the alleged enactment of said ordinance had no authority at any time



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Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



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No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. W. HUTTON,

Attorney for Plaintiff in Error.

Filed this.....day of May, 1915.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk, 1915

No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

Plaintiff in error was indicted and tried for an assault with intent to commit rape upon the person of one Mary Elizabeth Young, upon the steamship "Beaver", was found guilty and sentenced to four years' imprisonment at McNeil's Island, where he now is.

The complaining witness testified that she took passage on the "Beaver" at Portland, Oregon, for a voyage to San Francisco, as a cabin passenger, accompanied by her daughter, and they were assigned to room 73; that after the vessel had passed over the Columbia River bar, she then being in a

social hall on the upper deck, it became rough and she went down some steps in the after part of the vessel to the deck where her room was located, and as she went down the steps the defendant met her and assisted her to her room, her daughter then being in the room, but leaving immediately and not returning to the room or to her mother until the arrival of the vessel in San Francisco; she then claims the defendant left the room and shortly afterwards a man named Raphael went to the room and took some liberties with her; that defendant returned after Raphael left; that Raphael went back to the room again after defendant left, and afterwards at about 11 p. m. he again returned, locked the door, took off some of his clothes, got into her berth and attempted to have sexual intercourse with her; that after a time she became faint, and defendant then got up, lit a cigarette and finally left the room; she also testified that later on a man named De Brau went to the room and accomplished the act of sexual intercourse with her.

It is in evidence in the case that the room where the occurrences testified to by the witness are claimed to have happened, was a room about seven feet one way and eight the other, and was one of a cluster of four rooms that were constructed out of what is called tongue and grooved boards, that people occupied all of the surrounding rooms, that the complaining witness made no outcry whatever, that several watchmen and officers visited that part of the ship at frequent intervals during the night;

that there was a nightwatchman, De Brau, there to answer any call from an electric bell with which each room was provided, that the complaining witness had rung the bell once at least during the night, but did not at this time or after Oliver left, but that in the morning she made a complaint first to a lady passenger in a room across the lower part of a hall, the door of which room was constructed of what is called latticework, the door being immediately opposite the door to Mrs. Young's room, the hall being about three feet wide. Raphael was a waiter on the vessel, Oliver the porter, and De Brau the saloon nightwatchman.

Argument.

I.

PLAINTIFF IN ERROR WAS CONVICTED OF A COMMON LAW CRIME.

All Congress has ever done with relation to either the crime of rape or assault with intent to commit rape is to fix the punishment, as follows:

Penal Code, Sec. 276: "Whoever shall assault another with intent to commit a murder or rape, shall be imprisoned not more than twenty years."

Sec. 278: "Whoever shall commit the crime of rape shall suffer death."

Congress not having defined *the acts* necessary to constitute the crime of rape, the United States Attorney, was, of course, obliged to *allege acts* con-

stituting the crime as he believed it existed at common law, and defendant was of necessity convicted of a common law crime, or what the United States Attorney believed to be the crime at the common law. Our contention is, that the *acts* constituting the crime, must be defined by Congress or no crime exists.

A demurrer was interposed to the indictment, which was overruled.

The power of Congress to *create* crimes exists by virtue of Section 8 of Article I of the Constitution of the United States. Subdivision 10 of Section 8 reads:

“To *define and* punish piracies and felonies committed on the high seas, and offenses against the law of nations.”

This matter has received the attention of the United States Supreme Court several times, the first time in the case of

United States v. Hudson, 7 Cranch 31,
and the court there says:

“The only question which this case presents is, whether the circuit court of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly, because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute. Although this question is brought up now, for the first time, to be decided by this court, we consider it as having been long since settled in public opinion. In no other case, for many years, has this jurisdiction been asserted; and the general acqui-

escence of legal men shows the prevalence of opinion in favor of the negative of the proposition."

Page 32:

"The legislative authority of the Union must first make *an act* a crime, affix a punishment to it, and then declare the court that shall have jurisdiction of the offense."

That case was decided February 13, 1812.

In 1813, the case of United States v. Coolidge, 1 Gallison 488, came up before Justices Story and Davis. The case was exactly like this. The syllabus reads:

"Whether the Circuit Court of the United States has jurisdiction over common law offences against the United States."

The decision commences:

"The simple question is, whether the Circuit Court of the United States has jurisdiction to punish offences against the United States, which have not been previously *defined*, and specific punishment affixed, by some statute of the United States."

On page 490 the decision reads:

"The court then having complete jurisdiction, the next point will be to ascertain, what are crimes and offences against the United States. And here I contend, that recourse must be had to the *principles* of the common law, taken in connection with the constitution; in order to *fix* the definition, precisely as in other laws of Congress, we resort to the rules of the common law to give them an interpretation. For instance, Congress has provided for the

punishment of murder, manslaughter and perjury, under certain circumstances; but it has nowhere defined these crimes. Yet no doubt is ever entertained on trials, that the explanation of them must be sought and exclusively governed by the common law; and upon any other supposition, the judicial power of the United States would be left, in its exercise, to the mere arbitrary pleasure of the judges, to an uncontrollable and undefined discretion."

The learned judge on page 495, refers to the case of *United States v. Hudson*, and intimates that his decision is made for the purpose of again bringing the matter up before the Supreme Court. His Honor Justice Davis did not concur in the decision for that purpose, and the matter went to the United States Supreme Court.

In that court it appears from the proceedings that the matter was considered definitely settled by the case of *United States v. Hudson*; no argument was made; the decision was rendered March 21, 1816. See *United States v. Coolidge*, 1 *Wheaton* 415.

The United States Supreme Court said in that decision that it adhered to its ruling in *United States v. Hudson*, heretofore mentioned; which decision requires that the crime must be *defined*, etc. It disagreed with Judge Story's reasoning and reversed the decision.

Congress thereafter defined all crime, except the crime of "rape upon the high seas"; that seems to have been overlooked; and no decision of the United States courts can be found where a man has

been punished for crime unless the crime has been previously defined by Congress. Many decisions can be found and are below cited where demurrers to the indictments have been sustained because the crime had *not* been defined.

We respectfully call the court's attention to the footnote in *U. S. v. Worrall*, 2 Dallas 384; and also *United States v. Reese*, 92 U. S. 216.

"If Congress has not declared *an act* done within a statute to be a crime against the United States, the courts have no power to treat it as such."

Page 220. "Every man should be able to know with certainty when he is committing a crime."

U. S. v. Britton, 108 U. S. 206.

"There are no common-law offenses against the United States, *United States v. Hudson*, 7 Cranch. 32, *United States v. Coolidge*, 1 Wheaton 416, and section 5204 does not of itself create any offense against the United States."

Manchester v. Mass., 139 U. S. 262.

"And the courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the United States is wholly derived from the statutes of the United States."

Jones v. United States, 137 U. S. 211.

"In either case, the crime, the punishment and the procedure are statutory, the whole criminal jurisdiction of the United States being derived from acts of Congress."

U. S. v. Eaton, 144 U. S. 687.

“It is a principal of criminal law that an offense which may be the subject of criminal procedure, is *an act* committed in violation of a public law, either forbidding or commanding it.”

In re Kollock, 165 U. S. 526-533.

“We agree that the courts of the United States in determining what constitutes an offense against the United States, must resort to the Statutes of the United States made in pursuance of the constitution. * * *

Tennessee v. Davis, 100 U. S. 275.

“That the legislative authority of the Union must first make *an act* a crime, affix a punishment to it and prescribe what courts have jurisdiction of such an indictment.”

In Peters v. United States, 36 C. C. Ap. 105, decision by Judge Hawley, concurred in by Justices Ross and Morrow, this court says on page 109:

“It must be borne in mind that the national courts do not resort to common law as *a source* of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon congress to define *what are* crimes, to fix the proper punishment, and to confer jurisdiction for their trial. U. S. v. Walsh, 5 Dill 50, 60 Fed. Cas. No. 16,634; U. S. v. Martin, 4 Cliff 156, Fed. cases No. 15,728; In re Green, 52 Fed. 101; Swift v. Railroad Co., 64 Fed. 59; U. S. v. Hudson, 7 Cranch 32; U. S. v. Coolidge, 1 Wheaton 415; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531.”

See also,

U. S. v. Benson, 70 Fed. 591, decision by
Judge Hawley concurred in by Judge
Gilbert.

It is more necessary for the legislature to define the crime than it is to affix the punishment, as without a definition of the crime, no one could tell whether the act was a crime or not; punishment might be in a general statute, or section of the penal code, referring to other sections where the crime was created, and the act or acts constituting the crime prohibited. Rape has always been a statutory offense; the statutes of the different states *vary* as to what constitutes the crime, and they frequently vary in each state according as its legislature meets, that is particularly the case in California.

U. S. v. Hall, 98 U. S. 343-345;

U. S. v. Dietrich, 126 Fed. 678;

U. S. v. Martin, 176 Id. 111;

U. S. v. Lewis, 36 Id. 449.

Every person is presumed to know what the statutory law of the country in which he resides is, but he is not presumed to know what the statutory law of another country is, and he is certainly not presumed to know what the statutory law of England of centuries ago was.

Occasionally in text books, and sometimes in matter of dictum in some decisions, and in some state court decisions we find, that when a crime is named,

the courts may go to the common law for the definition of the crime; that has never been the law of the United States as abundantly appears by the foregoing decisions, the last expression of opinion by the U. S. Supreme Court being in *re Kollock*, 165 U. S. 526.

It follows from the foregoing that the crime of rape upon the high seas does not exist, and of course if the crime does not exist, there can be no such offense as an assault with intent to commit the crime.

There are a class of crimes such as burglary, which is committed when a person makes an unlawful entry with the intent to commit the crime of larceny or any other felony, in which it is not necessary to define what constitutes larceny, or in piracy where upon the high seas under certain conditions a person commits the crime of murder or robbery; that is to say where the commission of one crime is a part of an act necessary to commit another crime, in which it is not necessary to define the crime which the act which is a part of the crime defined; but nowhere in the United States Reports can any case be found where a crime is directly charged, that it has been held it is not necessary to define it.

The nearest that can be found are the cases of *United States v. Palmer*, 3 Wheaton 610, and *United States v. Smith*, 5 Wheaton 153.

Piracy was charged in both of those cases.

The commission of the crime of murder or robbery upon the high seas the commissions of which in some cases are necessary to constitute piracy without the statutory definition of the crime of piracy, would not make a man a pirate; piracy and burglary are both defined crimes, and their definition is necessary to make them such.

Both of the above cases are largely the foundation for what may be found in other authorities to the effect that the common law may be resorted to for a definition of a criminal offense; and examination shows they cannot be so used.

In both of those cases the question was largely whether the crime of piracy was properly defined, when Congress defined piracy and mentioned other crimes such as robbery and murder, without defining in the law defining piracy what robbery and murder was in the case of *U. S. v. Palmer*.

Chief Justice Marshall said;

“Yet it seems difficult to resist the conviction, that the legislature considered murder and robbery as *acts* of piracy.”

Mr. Justice Johnson says, that Congress had created two classes of offenses subdivided into two subdivisions, in one,

“Each crime is *specifically* described, in the ordinary mode of defining crimes, and so far the constitutional power of defining and pun-

ishing piracies and felonies on the high seas, is strictly complied with."

In the other, the legislature *referred* for a definition to other sources, to wit:

"If any person shall commit, upon the high seas, &c., murder or robbery or any other offense, which if committed in the body of a county, would be punishable with death. * * *"

That law at least referred to the *sources* of information to ascertain *what* robbery was; in the law in this case we have nothing but the penalty; but as was held, the crime of robbery and murder were but *acts* to constitute another crime, that of piracy, and the U. S. Supreme Court in the subsequent case of United States v. Smith, *supra*, said:

"To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done, either by a reference to crimes having a technical name, and determinate extent, or by enumerating the *acts* in detail, upon which the punishment is inflicted."

Supposing all that Congress had done in that case is what appears in this, simply said,

"Whoever shall commit the crime of *piracy* shall suffer death."

There can be no doubt as to what the decision of the Supreme Court would have been in both of those cases.

II.

THE EVIDENCE IN THIS CASE DOES NOT SHOW THE CRIME
OF ASSAULT WITH INTENT TO COMMIT RAPE WAS COM-
MITTED.

The prosecuting witness testified that Oliver went to her room, took off some of his clothes, got into the berth with her, and tried to have sexual intercourse; she then testified (page 25 of transcript):

“I don’t remember anything else. I resisted him, I could not remember anything else now just exactly what I did. I had one hand and I just pushed him like that, and he had my head and this arm down, and I could not say whether it was the right or left hand, I am not sure now, I did all I could that my little strength would allow me to keep the sheet around me, I could not get my clothes down here. I did not fight at all. I appealed to his better nature to leave me alone. That I am respectable and a mother of a family and I thought he would surely leave me alone when I would tell him that. He did not go away, he kept right on, for about ten minutes. I finally got exhausted and told him I am going to faint. He says, ‘You are kidding’, I says, ‘No, I am not, hurry please, and get me something’. Then he got up, swore at me, he swore at me before he got up.”

(Page 27). “I became completely exhausted and if Mr. Oliver had wanted to force me to have sexual intercourse with him I could not have resisted.”

The most the evidence shows was a simple assault; the prosecuting witness admits that defendant *could* have accomplished his purpose as far as any resistance on her part was concerned; she was in the

possession of all her faculties, her voice she did not use, she claims a sheet became wrapped around her, and all she did was to use one hand, the other hand being under her head. There is nothing in the whole record to show that Oliver could not have accomplished sexual intercourse if he had intended it; no threats were used. It is true she claims Oliver told her it was no use to cry out as it would do her no good—the first thing a woman would have done under such a statement would be to cry out—and in conclusion the witness testified that Oliver could have accomplished sexual intercourse with her as far as anything she could have done would have prevented him. Where, then, is there any evidence of an intent to have sexual intercourse at all events?

In Russell on Crimes, the author gives the definition of an assault with intent to commit rape, quoting from *Rex v. Lloyd*, 7 Car. & P., 318:

“In order to find the prisoner guilty of an assault to commit rape you (the jury) must be satisfied that the prisoner, when he had hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part.”

In this case resistance ceased, if there ever was any; the evidence seems to show that what resistance there was, was equivocal. Mrs. Young did not cry out; if she had, instant relief would have been afforded. In the following cases the evidence

was much stronger than in the case at bar, and it was held insufficient:

People v. Brown, 47 Cal. 447;

People v. Manchego, 80 Id. 306;

People v. Fleming, 94 Id. 308.

The latter is a well considered case, with quite a review of the authorities.

In the above case of *People v. Manchego*, the Supreme Court says, on page 307, quoting from a Texas case:

“Obviously, there is a manifest distinction between an assault to commit a rape and an assault with intent to have an improper connection. Any such violent or indecent familiarity with the person of a female against her will, where the latter is the extent of the purpose and intent of the aggressor, is an aggravated assault, and should be punished as such.”

The United States Supreme Court had occasion to consider a case of rape in

Mills v. United States, 164 U. S. 645.

There the evidence was much stronger than it is in this case, and it was held insufficient.

For the same reason, the court erred in refusing to give the following instructions (pages 52-53, 67 of record):

“If you find from the evidence in this case, that the defendant Harry Oliver made an assault at the time and place charged in the indictment upon the person of Mary Elizabeth Young, with the intent on his part to have forcible sexual intercourse with her, and that she resisted him until she was no longer able

to resist, or that she became exhausted, and that thereupon, or at the happening of either of such events the said Harry Oliver, defendant, voluntarily abandoned further effort without accomplishing such sexual intercourse, I then charge you that the said defendant is not guilty of the crime of an assault with intent to commit rape.

“There is a wide distinction between an assault with intent to commit rape, and an assault with intent to have an improper connection. There can be no intent to commit rape unless a defendant is resolved to use all force necessary and at all events to carry out his designs. Therefore, if you find from the evidence in this case that the defendant Harry Oliver sought to have sexual intercourse with Mary Elizabeth Young, named in the indictment, and could have accomplished his purpose by the use of force, but that at the time resistance on the part of said Mary Elizabeth Young, if such resistance there was, became overcome, and the said defendant by persisting in his endeavors and by the use of force could have had such sexual intercourse, but voluntarily withdrew and refrained from further effort, I then charge you that the defendant is not guilty of the crime charged in the indictment.”

The first instruction given by the court did not cure the failure to give the above instructions, as we find in it the following:

“There is a wide distinction between an assault with intent to commit rape and an assault with intent to have improper connection by means of persuasion, blandishments, etc., but without the use of force.”

Force could be used to obtain consent, and under the decisions the offense would be simple assault or battery.

III,

THE PROOF OF THE NATIONALITY OF THE "BEAVER" WAS INSUFFICIENT.

Section 272 of the Penal Code, requires that the vessel on which the act is alleged to have occurred, must have been committed

" * * * on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof."

The crime in this case is alleged to have been committed on or about April 12, 1914; the trial took place July 13th and 14th following. The only testimony on the ownership of the vessel is that of A. G. Ravenhill, who testified (page 31):

"I am purser on the steamer Beaver. I was such on April 12th, 1914. The Oregon-Washington Railroad & Navigation Company *owns* that vessel, that *is* an American corporation. That *is* an American vessel, flying the American flag. On the night of April 12th we were in American waters, off the coast of Oregon, etc."

We submit that showed ownership as on the July 13th, and not on April 12, 1914.

It will probably be argued by the United States Attorney, that the vessel would not have made the

trip from Portland to San Francisco unless she had been an American vessel. In other words, as it is unlawful for a *foreign* vessel so to do, it must be presumed that the law was not violated, and upon that, base the presumption that the vessel was either owned by an American citizen or an American corporation.

That is simply basing a presumption upon a presumption, which the law does not permit.

United States v. Ross, 92 U. S. 283-284.

It is a matter of common knowledge, however, that foreign vessels frequently carry passengers between domestic ports of the United States, and are content to pay a fine as a penalty for so doing.

It is the law in cases of removal of a cause from a state to a United States court that the affidavit must set forth, not only that the defendant is a citizen of another state or country as the case may be at the time of the making of the affidavit, but that he *was* at the time the case was commenced.

Dalton v. Germania Ins. Co., 118 Fed. 936.

A number of cases have been decided by the Supreme Court of the State of California, where an affidavit of service of summons has been questioned, the law requiring that the server shall be over the age of eighteen years at the time of service, and the affidavit has pointed to the time of *the making of the affidavit*, and not *to the time of*

service. In each case the judgment has been set aside. See,

Howard v. Galloway, 60 Cal. 10;

Weil v. Bent, id. 604;

Lyons v. Cunningham, 66 id. 43;

(Concurred in by Justices McKinstry and Ross.)

Barney v. Vigoureaux, 75 id. 377;

Horton v. Gallardo, 88 id. 582.

The fact of the "Beaver" being an American vessel on July 13, 1914, raises no presumption that she was such on April 12, 1914, as presumptions do not run backward.

Windhaus v. Bootz, 92 Cal. 617.

IV.

Mrs. Young testified as to the character of the underwear worn by Oliver on the night in question. Oliver's underwear was taken away from him by the jailer of Alameda County jail, and returned to him on the morning after the evidence was closed. Argument was about to be commenced, when his counsel asked permission to put him on the stand so that he could introduce the underwear in evidence. Permission was not granted (pages 46, 47), and we believe the court erred in refusing such permission. He had not known where his underwear was during the trial and his counsel, with the burden of the master and a number of officers of a steamship about to leave port on his hands,

could not be expected to find time to trace the underwear. As soon as he had information on its whereabouts he called the court's attention to the matter and could not very well do so before.

A motion for a new trial, and an arrest of judgment was duly made in this case, each of which was denied.

For the foregoing reasons, we respectfully submit the judgment should be reversed.

Dated, San Francisco,
May 15, 1915.

H. W. HUTTON,
Attorney for Plaintiff in Error.

No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

JOHN W. PRESTON,

United States Attorney,

Attorney for Defendant in Error.

Filed this.....day of August, 1915.

FRANK D. MOLLICKTON, *Clerk.*

By.....Deputy Clerk.

F. D. MOLLICKTON,
Clerk.

No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error was convicted on July 14, 1914, of the crime of an assault with intent to commit rape, upon the body of a female passenger, Mary Elizabeth Young, while she was on board the American steamer "Beaver" on the high seas. The plaintiff in error was later sentenced to serve a term of four years at McNeil Island where he now is.

The record shows that plaintiff in error was an employee of the steamer, to wit, a waiter, and it was customary for such employees to assist and in fact to alone attend the necessary wants of seasick female passengers.

This plaintiff in error, in conjunction with others, was charged by this lady with having criminally assaulted her while she was in an extremely helpless condition caused by seasickness and general physical infirmities. The sufficiency of the evidence is not challenged except in one or two particulars hereinafter noted.

The case appears to be a simple one and little if any difficulty should, in our opinion, stand in the way of an affirmance of the judgment.

DEFINITION OF CRIME.

Counsel contended on demurrer to indictment and again here renews his contention, that the statute of the United States touching the crime of rape is insufficient in that it fails to set out therein the particular ingredients necessary to constitute the offense. The statutes are as follows:

Penal Code, Sec. 276:

“Whoever shall assault another with intent to commit a murder or rape, shall be imprisoned not more than twenty years.”

Sec. 278:

“Whoever shall commit the crime of rape shall suffer death.”

The Constitution, Article I, Section 8, Subdivision 10, defining the power of Congress in criminal legislation is as follows:

“To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.”

The doctrine that the federal courts have no common law jurisdiction is well settled and we have no fault to find with the decisions cited to this effect, (see brief of counsel, pp. 4-9) the substance of which decisions may all be summed up in this language of the Supreme Court:

“The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction.”

United States v. Hudson, 7 Cranch, 32, 3 L. Ed. 260.

The entire set of cases cited by counsel go no further than this doctrine.

The cases relied on by counsel are found in his opening brief, pages 4 to 11.

GOVERNMENT'S POSITION.

It is the position of the Government that Congress has declared rape and assault to be crimes and has declared the court that shall have jurisdiction of them and has also in effect declared that the common law definition of rape shall be the crime denounced by the statute. This doctrine seems to be well settled, yes it seems to have been well settled for more than one hundred years. Hundreds and probably thousands of cases

have been prosecuted under this and similar statutes with not even so much as a suspicion of the alarming situation urged by counsel. I should think a strong showing should be made to upset a settled practice of more than a century.

If there is no federal law on the crime of rape neither is there any law of the various kinds of assault, for which prosecutions daily are occurring in the federal courts of the United States. Indeed, if no law exists against this most dastardly of all classes of crime, then indeed we as a nation have been most lax in our duty.

But we take it that the law is well and thoroughly settled that when Congress denounces a crime that the common law may be resorted to for a definition. Indeed, if the common law may not in our system be resorted to for a definition of legal terms, we would be in a hopeless condition.

Take the question of murder itself. Our statute says that "murder is the unlawful killing of a human being with malice aforethought". Where shall we go to find a definition of the words "unlawful" and "malice aforethought"? There is no place to go except to the common law.

If we may go to the common law for these definitions why may we not accept the well understood common law definition of rape?

The situation is well explained by Clark on Criminal Law (second edition, page 427) as follows:

“Though the federal courts derive no jurisdiction from the common law, yet where congress has conferred jurisdiction of a crime in general terms, without defining it, they may look to the common law for its definition. Thus, an act of congress declares murder, manslaughter, rape, and other crimes upon the high seas or in certain specified places to be crimes punishable in the federal courts, but does not define those crimes.”

Mr. Wharton (eleventh edition) Vol. I, p. 370, states the rule as follows:

“While, therefore, it is settled that the federal courts have no jurisdiction of offenses not declared to be such by federal statute, yet, as these statutes mostly designate offenses by title, leaving their definition to the common law, it is the common law that is the final arbiter as to what such offenses are.”

In Volume 5 of Encyclopedia of United States Supreme Court Reports, at page 56, we have the following language:

“A statute may define and punish an offense by its common law name; and the common law definition will be applied by both the federal and state courts.”

citing,

United States v. Smith, 5 Wheat. 153, 159;
5 L. Ed. 57;

Benson v. McMahon, 127 U. S. 457, 466; 32
L. Ed. 234;

Wright v. Henkel, 190 U. S. 40, 59; 47 L.
Ed. 948;

United States v. Palmer, 3 Wheat. 610; 4
L. Ed. 471;

United States v. Carll, 105 U. S. 611; 26 L. Ed. 1135;

Pettibone v. United States, 148 U. S. 197, 203, 37 L. Ed. 419;

In re Kollock, 165 U. S. 526, 41 L. Ed. 813.

“By giving it a name known to the common law, a crime is not less clearly ascertained than it would be by using the definition as found in the treatise of the common law. In fact, by such a reference, the definition is necessarily included, as much as if it stood in the text of the act. That is certain which is, by necessary reference included in that term. That is certain which is, by necessary reference, made certain.

United States v. Smith, 5 Wheat. 153, 159; 5 L. Ed. 57;

In re Kollock, 165 U. S. 526, 533; 41 L. Ed. 813, citing

United States v. Eaton, 144 U. S. 677; 36 L. Ed. 591; and

Caha v. United States, 152 U. S. 211, 38 L. Ed. 415.”

Counsel insists that *United States v. Smith*, *supra*, is to be distinguished from the case at bar in that murder and robbery are well understood and defined crimes and that robbery, the charge in the *Smith* case, was only one class of piracy and had the offense been for any other act than murder or robbery the statute would have been inoperative. I cannot see the force of this argument. The decision is squarely to the point that piracy “as defined by the law of nations” is of itself a sufficient statutory definition. The law of nations is a part of the common law. This entire decision is to

the effect that piracy is a well understood term in the law and is a sufficient definition of the offense.

Rape is certainly a well understood crime at common law and Congress intended it to have its common law definition.

As above stated this doctrine is too well fortified and too well understood to be ignored or set aside at this late day in our history when technicalities do and should play only a small part in our system for the suppression of crime.

EVIDENCE AND INSTRUCTIONS.

Counsel quotes a small fragment of the evidence and then asserts that plaintiff in error did not possess the required intent, because the woman became in such a condition she could no longer resist.

How weak is this contention in the face of the real facts, a few of which will now be pointed out.

1st. This woman was a stranger aboard a vessel on the high seas in the darkness of the night with a violent storm raging.

2nd. She was a frail little woman having had a capital operation and deathly seasick as well.

3rd. She was without protection of any kind from the management of the vessel and was solely at the mercy of the plaintiff in error.

4th. She stated that she also feared that she might be thrown overboard by defendant in error.

5th. This defendant in error, her sole protector, after behaving indecently in the way of forcibly undressing the woman, returned and coming into the stateroom, locked the door, told her it would do no good to cry out, and forcibly struggled with her in bed and a description of it is too vile for print and I refer the court to the testimony of witness (Trans. pp. 11 to 14).

6th. Everything, including the condition of undergarment, corroborates the witness and the only reason plaintiff in error did not do more was that his animal force had spent itself.

And yet in face of these facts counsel says that no proof appeared warranting the verdict.

We submit the sufficiency of the proof is self-evident.

Complaint is made of two instructions refused upon request.

In so far as the instructions were law and appropriate they were fully covered and explicitly given by the court as follows:

“To constitute the crime of assault with intent to commit rape, the assault must have been made with the intent to commit rape, notwithstanding all possible resistance that could be made, and with the resolve on the part of the party charged to use all force necessary to carry out his designs. The intent must have been to perpetrate the crime at all events, regardless of what the party upon whom the

assault is made might or could do to prevent it. There is a wide distinction between an assault with intent to commit rape and an assault with intent to have improper connection by means of persuasion, blandishments, etc., but without the use of force. Such an assault does not constitute the offense here charged. But if the defendant did make such assault upon the person of Mary Elizabeth Young, at the time and place alleged with the intent to have unlawful carnal knowledge of her by force and against her will, and with the resolve on his part to use all force necessary to carry out his design, the offense of assault with intent to commit rape was then complete, and such offense could not be affected by any subsequent abandonment of the attempt, or by any subsequent modification of the intent. But if the jury believe that defendant did make an assault upon the said Mary Elizabeth Young, with intent to have sexual intercourse with her, the fact, if it be a fact, that she resisted him until she was no longer able to resist, or that she became exhausted, and that thereupon, the defendant voluntarily abandoned further effort without accomplishing sexual intercourse will be considered and weighed by the jury in determining whether or not the defendant did have the intent to have unlawful carnal knowledge of the said Mary Elizabeth Young by force and against her will, and the resolve to use all necessary force to accomplish his design.

The intent hereinbefore described, is an essential element of the offense charged, and you must acquit the defendant unless you find the existence of such intent beyond a reasonable doubt.

The intent need not, however, be found for any fixed period of time before the act is committed. It is sufficient if it coexists with the

commission of the act. The intent or purpose with which a given act is committed is to be gathered from all the attendant circumstances, and need not be shown by any open declamation of the party charged that such was his intent. It may be deduced from all the circumstances shown in the evidence, including all acts done or statements made by the defendant, if you find there were any such. It is to be gathered by the jury from those sources by applying their reasons and judgment to the evidence and making the deductions therefrom which men of ordinary experience and observation in the affairs of life would naturally draw. When the intent is thus made manifest, and the jury are able to find from these sources beyond a reasonable doubt the existence of the intent which is essential to constitute the offense, it satisfies the law and is sufficient, if other elements are shown, to sustain guilt."

The intent to use force, like any other fact in the case, may be inferred from the circumstances.

The case of *Mills v. United States*, 164 U. S. 644; 41 L. Ed. 584, lends no comfort to the position of plaintiff in error. That decision holds that "where the woman's will or resistance had been overcome by threats or fright, or she had become helpless or unconscious" no resistance of any kind is required.

Again the California Supreme Court in case of *People v. Stewart*, 97 Cal. 238, distinguishes or rather explains *People v. Fleming*, 94 Cal. 308, and holds (syllabus):

"Where the conduct of a defendant charged with an assault with intent to commit rape is

shown to have been such, at the time of the alleged assault, as to indicate that his mind was bent upon using whatever force upon the female would be necessary to accomplish the consummation of his desires, the evidence is sufficient to support a conviction of the offense, and the fact that he abandoned his intentions before the consummation of the act, by reason of the approach of other parties, or by reason of the pains of a stricken conscience, will not purge him of the legal consequence of his criminal conduct."

From the above it is clear that the court followed the rules of law accurately.

The proposed instructions do not deal with elements of fear, fright and helplessness on the part of the prosecutrix caused by acts, threats, and force used by plaintiff in error and in the form proposed the court would have been justified anyway in refusing them.

NATIONALITY OF VESSEL.

Plaintiff in error contends that it was not shown that the vessel was an American vessel and cites the testimony of the purser, A. G. Ravenhill (Trans. p. 31) to the effect that he was purser on the night of the crime and that they were on the high seas off the coast of Oregon and that the "Beaver" is an American vessel. Counsel thinks that failure to use "was" instead of "is" is fatal to proof of venue.

We submit that no person reading the context would fail to know that examination was directed to date of crime and not date of trial.

Besides, no counter-showing was made or attempted and moreover none but American vessels could engage lawfully in coastwise trade.

FOURTH POINT.

Plaintiff in error urged that he should have been allowed to reopen the case after same was closed and give in evidence his underwear (see p. 37). This of course is a discretionary matter. Besides, witness identified no underwear. She only stated that she would recognize the kind of underwear plaintiff in error wore (Trans. p. 12).

The record shows that the district attorney stated to the court that he had excused the jailer as a witness and that he had gone and that by witness he would show that underwear mentioned was not the underwear worn by the plaintiff in error at the time complained of.

We submit the cause should be affirmed.

Dated, San Francisco,

August 18, 1915.

JOHN W. PRESTON,

United States Attorney,

Attorney for Defendant in Error.

No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

H. W. HUTTON,

Attorney for Plaintiff in Error.

Filed this.....day of September, 1915.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

Filed
SEP 11 1915
F. D. Monckton,
Clerk.

No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

This matter was argued and submitted May 27th, 1915. August 23rd the United States filed a brief, and on September 7th, 1915, plaintiff in error obtained permission from the Court to file the following reply.

I.

Replying to what appears on pages 1 to 7 of the Government's brief we beg to state, that plaintiff in error was not a waiter, he was porter, and had nothing to do with the passengers either male or female, except as they might need electric lamps placed in their rooms as the lamps burned out.

It is true as stated on page of the Government's brief, that our position is, that:

“The legislative authority of the Union must first make an act a crime, affix a punishment to

it and declare the court that shall have jurisdiction."

That is the language of the U. S. Supreme Court. The most essential part of a penal statute is the prohibited act, without a prohibited act there can be no punishment nor any court declared to impose punishment, and the prohibited act is wanting in this attempted penal statute.

Congress has nowhere in effect or otherwise declared "that the common law definition of rape shall be the crime denounced by the statute." Nor would it have the power so to do in the light of what the United States Supreme Court has frequently said. And no such doctrine is well or at all settled. When such a doctrine was first asserted the United Supreme Court frowned upon it, held it could not be done, and that has been the established doctrine of this country ever since.

Neither hundreds, nor thousands or any cases have been prosecuted under similar statutes, counsel has not cited any, for the good and sufficient reason that none can be found, the nearest attempt was in *U. S. vs. Coolidge et al.*, 1 Gallison 488, cited in our first brief, and the United States Supreme Court on appeal said that such a practice could not be permitted.

If Congress has been derelict in duty, or overlooked this particular crime, it is the fault of Congress, in the absence of proper action by it, there are no crimes, and Congress must bear the burden of its oversight. We have, however, no doubt the

United States Attorney will call the attention of Congress to this attempted crime at its next session.

In Murder, "murder is the unlawful killing of a human being with malice aforethought."

Congress has defined *the act* as the unlawful killing of a human being, malice aforethought is but a state of mind, evidenced by the circumstances that surround the crime. With the words "malice aforethought" eliminated, the crime of murder would still be properly defined as the act has been defined.

II.

Review of the Government's Authorities.

Clark on Criminal Law, is one of the series of publications known as "The Hornbrook Series", cheap works, incomplete, and they do not undertake to be standard, it designates itself as a "*Handbook of Criminal Law.*"

The merits of the book, and the quotation in the Government's brief herein is best shown by the following parts of the quotation:

"Thus, an act of Congress declares murder, manslaughter, rape, and other crimes upon the high seas or in certain specified places to be crimes punishable in the federal courts, but does not define those crimes."

Then take the following from the decision in *U. S. vs. Coolidge*, 1 Gallison 490:

"For instance, Congress has provided for the punishment of murder, manslaughter and perjury, under certain circumstances; but it has nowhere defined these crimes."

It is very evident that Mr. Clark when he wrote his book on Criminal Law, had the case of *The United States vs. Coolidge*, 1 Gallison, before him, and borrowed his ideas from that decision, almost borrowing the language, but did not take pains to ascertain whether that case had been affirmed or reversed by the United States Supreme Court. He could not have even read the whole of the decision, as on page 495 we find the following:

“I have considered the point as one open to be discussed, notwithstanding the decision in the *United States vs. Hudson & Goodwin*, February term 1812, which certainly is entitled to the most respectful consideration; but having been made without argument and by a majority only of the court, I hope that it is not an improper course to bring the subject again in review for a more solemn decision, and it is not a question of mere ordinary import, but vitally affects the jurisdiction of the United States; a jurisdiction which they cannot lawfully enlarge or diminish.”

Mr. Clark did not take the pains to ascertain what the answer of the United States Supreme Court to that language was. The answer, however, was, that in statutes such as the one in question in this case the United States Courts have no jurisdiction. He was in error again when he wrote:

“An act of congress declares murder, manslaughter, rape and other crimes, upon the high seas or in certain specified places, to be crimes punishable in the federal courts, but does not define those crimes.”

All crimes have been defined except rape and assault with intent to commit rape, the penal code and statutes are evidence of that.

Again it is impossible to reconcile what we find on pages 425 and 426 of his work, and what is printed in the Government's brief from page 427.

This whole matter is correctly stated in Vol. 1, Page 103, Sec. 11, Sub'd of Rose's Code of Federal Procedure, as follows:

"It has been frequently declared that the courts created by Congress to exercise the Federal judicial power, have no power to declare *any act* to be a crime against the Federal government *because it is such at common law* principally where Congress has not declared it criminal and authorized its punishment in such courts. And though the first decision of the matter was by the court without the benefit of argument by counsel, and its correctness was afterwards questioned, numerous cases have since affirmed the principle that there are no common law offenses against the United States, and *an act must come within some penal law of Congress to be punished therein as a crime.*"

The Encyclopedia of United States Supreme Court Reports is published, not by the United States Government, but by "The Michie Company Law Publishers, Charlottesville, Va.," under the editorial supervision of Thomas Johnson Michie.

On page 55 of Volume 5 we find the case of *U. S. vs. Brewer*, 139 U. S. 278, cited. The Supreme Court, on page 288, says as follows:

"Laws which create crime ought to be so explicit that all men subject to their penalties

may know what acts it is their duty to avoid. Before a man can be punished, his case must be plainly and unmistakably *within the statute*."

U. S. vs. Lacher, 134 U. S. 628.

We will now see whether the cases cited bear out what the writer of the Encyclopedia claims for them.

United States vs. Smith, 5 Wheaton 153, was a piracy case, and is hereafter reviewed herein.

Benson vs. McMahon, 127 U. S. 457, was an *extradition case*; we submit that it is not necessary to set out the acts constituting the crime in both countries, in a treaty.

Wright vs. Henkel, 190 U. S. 40, was also an extradition case.

United States vs. Palmer, 3 Wheaton 610, was a piracy case.

United States vs. Carl, 105 U. S. 611, was a case where the only question involved was, whether the indictment was within the language of the statute.

In *Pettibone vs. the U. S.*, 148 U. S. 197, all the Court had under consideration was the meaning of the word "conspiracy."

In re Kollock, 165 U. S. 533, is squarely against the Government in this case, the Supreme Court saying on that page:

"We agree that the courts of the United States, in determining what constitutes an offense against the United States, *must resort to the Statutes of the United States enacted in pursuance of the constitution*."

We are unable to find anything in *Caha vs. United States*, 152 U. S. 211, that in any way bears upon the points it is cited to support.

We find in *U. S. vs. Eaton*, 144 U. S. 677, the following on page 687:

“It is well settled that there are no common law offenses against the United States.”

It will thus be seen, that whatever we do find in the authorities cited in the encyclopedia that are pertinent, all of which are inserted bodily in the Government's brief, are squarely opposed to the editor's language, and against the contentions of the Government in this case.

It is a well-known fact, that Congress has never defined crimes by titles, as stated on page 5 of the Government's brief. It did start in to do that, but was halted by the decisions we have referred to.

If a man can be punished, where the act constituting the crime is not set out in the statute, why has counsel not cited a case where it has been done? As we have stated, we have cited cases where it has been held that it could not be done.

We never claimed that if the charge of piracy in the Smith case had been any other form of piracy but that of the commission of murder or robbery on the high seas, the statute would have been in-operative.

In the Smith case, the statute said:

“Whoever on the high seas, commits the crime of piracy *as defined by the law of nations, etc.*”

The sole question involved was, whether the crime of piracy was properly defined. The Supreme Court, on a divided court, held that piracy under the law of nations was a well understood crime, and the statute sufficiently and properly defined the crime.

If the section involved in this case, Penal Code 278, even read:

“Whoever shall commit the crime of rape as defined by the common law, shall suffer death.”

We would have a statute as broad as the statute in the Smith case. As it is, it falls far short of that. The Smith case is therefore in support of Plaintiff in Error's contentions.

III.

Evidence and Instructions.

There is nothing in the evidence to show that Mrs. Young was or is a frail woman.

There is some evidence to show that she underwent a capital operation a great many years ago and had fully recovered from it.

It is idle to say she was without protection from the management of the vessel or otherwise. Watch-

men were continually going by her room, passengers were within three feet of her, and the slightest outcry on her part would have brought a flood of people to her. So she could not have been at the mercy of the plaintiff in error.

She was of mature years, and it is idle for counsel to say she could have feared being thrown overboard. To have done so, plaintiff in error would have had to carry her from her room, along the saloon of the vessel, up stairs, then through the social hall, with people constantly moving around, and two watchmen and officers of the vessel constantly around.

After the time she claims plaintiff in error undressed her, others went to her room. She seems to have been satisfied for them to go, she even rang up for the night watchman, and still knowing that there were women, children and men within a few feet of her, she made no complaint until the next morning. Her room was not a sealed room, it was partly made of lattice work; what was not of lattice work was of thin tongue and grooved board, which would carry the slightest sound, still no sound or outcry was made.

There is nothing in the case on which to base the following statement on page 8 of the Government's brief:

“Everything, including the condition of the undergarment,” etc.

An undergarment was offered in evidence, objection made and it was not admitted.

As to whether the evidence supports the verdict, our contention has always been that the very most it shows is a simple assault. The case of *People vs. Stewart*, 97 Cal. 238, is cited in the Government's brief.

In that case Stewart and the complaining witness were driving along a public highway, and he addressed certain language to her touching his desires and purposes.

There is nothing to that effect in this case. Stewart stopped the buggy, got out and apparently fastened the horse to a bridge railing, and asked the complaining witness whether she would get out of the buggy without any trouble; she said no; he said he would pull her out, and the complaining witness told him he would not. He then caught hold of her, she caught hold of the buggy, he pulled her hands loose and pulled her out, he then threw her down on the bridge, falling with her, and just then he heard a team coming and he jumped up saying "here comes a team, get into this buggy," but the complaining witness ran for the team that was coming.

There is a wide difference between that case and this. In this, there is not one word showing that defendant ever said he intended to have sexual intercourse with Mrs. Young. He was not frightened away, he could have had sexual intercourse if that

had been his intent; *the fact that he did not do so shows lack of intent.*

The evidence in the case of the *People vs. Brown*, 47 Cal. 447, was much stronger than it is in this case, and it was held insufficient, the Court saying on page 450:

“There was no resistance upon the part of the woman, or if there was any, it was of such equivocal character as to fairly suggest actual consent, or at most not a very decided opposition upon her part.”

We claim that the opposition of Mrs. Young, if opposition there was, was of such an equivocal character that it amounted to no opposition at all. The fact that she did not cry out, or did not when defendant left her, immediately arise and seek assistance, or report to someone, shows that she made no opposition.

People vs. Manchego, 80 Cal. 306.

In that case the proof was stronger than in this, a verdict of simple assault returned and held proper.

The case of *People vs. Fleming*, 94 Cal. 308, is very like this case, and the Court held the evidence insufficient, saying on pages 311 to 313:

“By her testimony it is apparent that defendant desired to have sexual intercourse with her, and that he committed either an assault or a battery upon her, of a technical character at least, while engaged in his solicitations and blandishments, but these things may all be true and be entirely foreign to any intention on his

part to commit the crime of rape by the use of force to the extent of overcoming all resistance she might offer.

Citing *Commonwealth vs. Merrill*, 14 Gray 415.

These facts would have been sufficient to warrant a jury in finding the prisoner guilty of an assault. It is therefore necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal, *or equally consistent with the absence of the felonious intent charged in the indictment*, then it is clear that they are insufficient to warrant a verdict of guilty."

Page 313:

"A rape was not accomplished, hence the intent of the defendant must be determined from his acts and conduct. If he had intended to use force in carrying out his purpose why was it not done? *Why was not the crime of rape committed?* It is conceded the woman was not possessed of a sufficient power of resistance, if he had used physical force. The law says there is no intent to commit a rape unless a defendant is resolved to use all force necessary to carry out his designs. He could have carried out his designs by using force, but at the very moment when his success was assured, when, according to her statement, she was exhausted, and her refusals and oppositions to his desires had entirely ceased, at that moment he voluntarily left her bed and retired to an adjoining room, where he passed the remainder of the night. *His departure was no flight, for there was no alarm; there was no danger of discovery; and the conduct of the defendant at*

this time was entirely inconsistent with that of the would-be ravisher. The acts and conduct of the defendant were not only equivocal and consistent with the absence of a felonious intent to commit rape, but the evidence preponderates to the effect that the accused depended for success in the accomplishment of his design upon the solicitations and blandishments of the seducer, rather than upon the physical force necessary to constitute the crime here charged." Cases cited.

That case cites and reviews a number of English and other authorities, and should be conclusive of this. If Mrs. Young was a weak frail woman, as counsel states, why did not the defendant have sexual intercourse with her if that was his intent? Why did he not have sexual intercourse with her when she became exhausted? There was nothing that she did at any time that would have stopped him, she simply laid there and talked, with one hand under her head. She says:

"I did not fight at all, I appealed to his better nature to leave me alone," etc.

That shows it was simply a matter of attempted persuasion on his part. Again she says:

"I became completely exhausted, and if Mr. Oliver had wanted to force me to have sexual intercourse with him I could not have resisted."

Where is there any intent to commit a rape at all hazards in this case?

Counsel is in error when he states that the law was fully covered by the instructions given. We

will take instruction I given, as it appears in the Government's brief, as follows:

“To constitute the crime of assault with intent to commit rape the assault must have been made with the intent to commit rape, notwithstanding all possible resistance that could be made, and with the resolve on the part of the party charged to use all force necessary to carry out his designs. The intent must have been to perpetrate the crime at all events, regardless of what the party upon whom the assault is made might or could do to prevent it.”

That instruction is sound as far as it goes, but it is followed by the following, a part of the same instruction:

“There is a wide distinction between an assault with intent to commit rape and an assault with intent to have improper connection by means of persuasion, blandishments, etc., *but without the use of force*, such an assault does not constitute the offense here charged.

All the authorities recognize the fact that force can be used to secure consent and the crime of an assault with intent to commit rape is not committed if the endeavor is to procure consent, even though force is used to obtain consent.

The jury were in effect charged that if any force at all was used it would be an assault with intent to commit rape and there could be no such thing as an assault with an intent to have an improper connection if any force whatever was used, whether the intent was to accomplish an act of sexual inter-

course, or merely to obtain the consent of the female.

We then have the following language, which taken with what we have heretofore quoted, must have misled the jury:

“But if the defendant did make *such assault* upon the person of Mary Elizabeth Young,” etc.

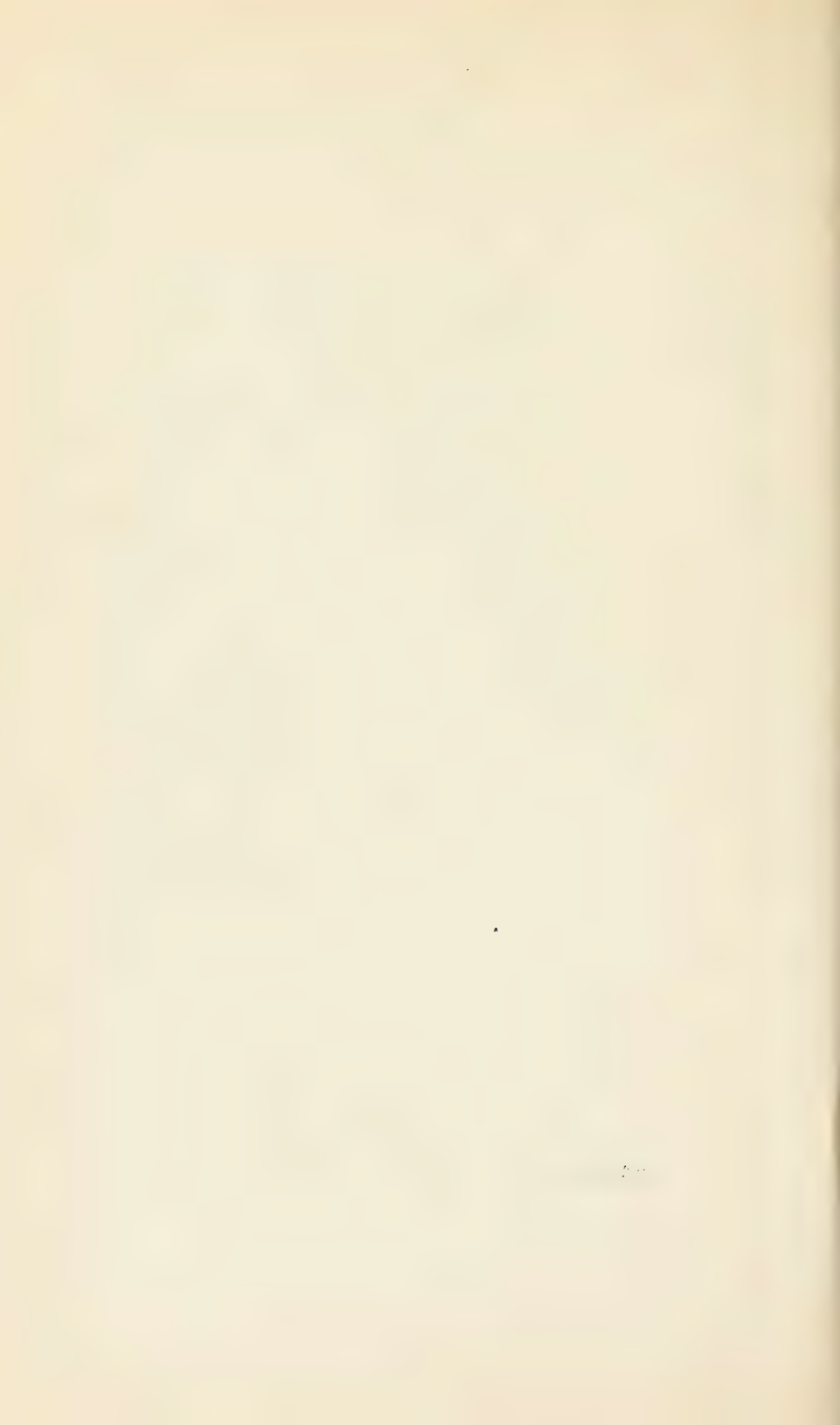
The Court says such assault, and does not say which of the preceding assaults it meant. It is thus clear that instructions found on pages 15 and 16 of our first brief should have been given.

We do not find any other matter in the Government's brief that requires an answer, and submit that the judgment herein should be reversed.

Respectfully,

H. W. HUTTON,
Attorney for Plaintiff in Error.

In the case of *U. S. v. Smith*, 226 U. S. 271, decided this year, it is said:
“A charge of crime against the United States must have clear legislative basis”
(Cases cited)



No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING

H. W. HUTTON,

Attorney for Petitioner.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

Filed
MAR 3 - 1916

No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,

vs.

Plaintiff in Error,

THE UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A REHEARING

To the Honorable the above-entitled Court, and to the Judges thereof:

Harry Oliver, the plaintiff in error, respectfully petitions for a reconsideration of the above cause, and for reasons therefor presents the following:

The United States Constitutional Convention discussed Sub. 10 of Sec. 8, Ar. 1 of the U. S. Constitution at some length before its final adoption by it, and the proceedings show that the discussion was had and the law as it now stands passed for the very purpose of preventing the *designation* of felonies on the high seas, but for the purpose of enforcing the *definition in detail* of such felonies by Congress. The articles of Confederation said:

“The United States in Congress assembled, shall have the sole and exclusive right and power of appointing courts for the trial of piracies on the high seas.”

That language, of course, was inadequate for all required purposes, and when the matter came before the convention several propositions were introduced, amended, and the law eventually reached the stage of reading “To declare the law of piracies and felonies committed on the high seas.”

The following then occurred:

“Mr. Gouverneur Morris then moved to strike out ‘to declare the law’ and insert ‘punish’ before ‘piracies’ and this motion prevailed. The sentence then read, ‘To punish piracies and felonies committed on the high seas, etc.’ Mr. Madison and Mr. Randolph then moved to insert ‘define and’ before ‘punish.’ This caused debate in the Convention. Mr. Wilson thought ‘felonies’ *was sufficiently defined by common law*, and Mr. Dickinson agreed with him. Mr. Mercer favored the amendment. *Mr. Madison said felony at common law was vague. It was also defective.* Mr. Gouverneur Morris said he would prefer *designate to define.*”

The language then passed coupled with some other offenses, and the whole matter went to the committee on style and was reported back with the other offenses segregated and it was reported back to read

“To define and punish piracies and felonies committed on the high seas, and *punish* offenses against the law of nations,”

and in that form adopted.

Afterwards Mr. Morris moved to strike out the word "punish" before the words "offenses against the law of nations," so as, he said, to let these be definable as well as punishable, by virtue of the preceding member of the sentence. Mr. Wilson hoped the alteration would not be made, as he thought it would look like arrogance to attempt to define the law of the whole civilized world. Mr. Morris replied:

"That the word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule."

The motion then passed by a vote of six states against four.

Mr. Madison said upon this section:

"The provision of the Federal Articles on the subject of piracies and felonies, extends no further than to the establishment of courts for the trial of these offenses. The definition of piracies might, without inconvenience, be left to the law of nations, though a Legislative definition of them is found in most municipal codes. *A definition of felonies on the high seas, is evidently requisite. Felony is a term of loose signification, even in the common law of England, and of various import in the statute law of that kingdom. But neither the common, nor Statute law of that, or of any other nation, ought to standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term, as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the states; and*

varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper." Watson on the Constitution, Vol 1, pages 670-675.

It will be thus very clearly seen what the Convention intended, what they did is clear, they said felonies must be *defined* not *designated* by name, and violence is done to language, when it is said you can define by using a term of a known and determinate meaning, that is creating a crime by name or designation, exactly what the learned men in the constitutional convention tried to, and, unquestionably by their language did prevent.

We will now respectfully call the Court's attention to the Smith case, that was a case of piracy, and unquestionably intended by the U. S. Supreme Court *to apply to cases of piracy, and not to felonies.*

We find in it the following language:

"And it has been very justly observed, in a celebrated commentary that the definition of piracies might have been left, without inconvenience, to the law of nations, though a legislative definition of them is to be found in most municipal codes."

That language is found above in the remarks of Mr. Madison; what follows is:

"A definition of felonies on the high seas, is evidently requisite."

In the Smith case the language was:

“That if any person or persons whatsoever shall upon the high seas commit the crime of piracy *as defined by the law of nations.*”

In this case the language is:

“Whoever shall commit the crime of rape shall suffer death.”

The laws are not similar. If the law in the Smith case had read:

“Whoever shall commit the crime of piracy shall suffer death”

it would be like this case, and if the law in this case read:

“Whoever shall commit the crime of rape as defined by the common, or some other law,” naming it, it would be like the Smith case.

The source of certainty is pointed out in the Smith case, to wit the law of nations, of which courts take *judicial knowledge*; this Court cannot take judicial knowledge of the common criminal law, and how can it be said that the facts stated in the indictment in this case constitute rape at common law? If they did, where do we arrive?

All the courts of the United States have held that they have no common law jurisdiction; this Court properly held in *Peters vs. United States*, 36 C. C. App. 105:

“It must be borne in mind that the national courts do not resort to common law as a source of criminal jurisdiction. Crimes and offenses

under the authority of the United States can only be such as are expressly designated by law. It devolves upon Congress *to define* what are crimes, to fix the proper punishment, etc.”

So we cannot go to the common law for certainty; where then can we be made certain?

And in *U. S. vs. Benson*, 70 Fed. 591, 594:

“But the national courts resort to the common law as a source of criminal jurisdiction. It devolves upon Congress *to define what are crimes*, to fix their punishment and to confer jurisdiction for their trial. (Cases cited.) We must therefore *look elsewhere than to the common law* for the test to be applied which shall determine the validity of the indictment.”

To supplement that language, we add that the *common law of crimes, never at any time applied on the high seas.*

So where is the oasis in the desert of uncertainty created by the mere naming of a crime, as in this case? We cannot go to the common law for certainty; where then can we be made certain? Where is the prohibited act, *the crime that Oliver was convicted of to be found?*

Again in the Smith case, the Court expressly finds that piracy is sufficiently defined by the law of nations.

It is proper it should be so defined, *piracy is an international offense*, such an offense as other nations might be interested in, and no nation should

arrogate to itself the right to define it without consulting other nations, as was well said by Mr. Wilson in the constitutional convention when this article of the Constitution was under discussion.

“Mr. Wilson hoped the alteration would by no means be made. To pretend to *define* the law of nations, which depended on the authority of all the civilized nations of the world, would have a look of arrogance that would make us look ridiculous.”

We now call the Court's attention to the language in the Smith case, following the language quoted therefrom in this case:

“It is next to be considered, whether the crime of piracy is defined by the law of nations, etc.”

And the Court then proceeds and shows that it has been so defined.

We now respectfully call the Court's attention to the fact that Judge Story, the writer of the decision in the Smith case, himself was of the opinion that felonies *must be defined by Congress*, and that a different rule related to piracies.

In *Story on the Constitution*, written in 1833, about 13 years after the Smith case was decided, we find:

“Sec. 1159. If the clause of the Constitution *had been confined to piracies*, there would not have been any necessity of conferring the power to define the crime, since the power to punish

would necessarily be held to include the power of ascertaining and fixing the definition of the crime. Indeed, there would not seem to be the slightest reason to define the crime at all; for piracy is perfectly well known and understood in the law of nations, though it is often found defined in mere municipal codes. By the law of nations, robbery or forcible depredation upon the sea, *animo furandi*, is piracy. The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the universal law of nations; a pirate being deemed an enemy of the human race. The common law, therefore, deems piracy to be robbery on the sea: that is, the same crime which it denominates robbery when committed on land. And if Congress had simply declared that piracy should be punished with death, the crime would have been sufficiently defined. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term; for that is certain, which by reference, is made certain. If Congress should declare murder a felony, nobody would doubt what was intended by murder. And, indeed, if Congress should proceed to declare that homicide 'with malice aforethought' should be deemed murder and a felony, there would still be the same necessity of ascertaining, from the common law, what constituted 'malice aforethought'; so that there would be no end to difficulties or definitions, for each successive definition might involve some terms which would still require some new explanation. But the true intent of the Constitution in this part, was, not merely to define piracy as known to the law of nations, but to enumerate what crimes in the national code should be deemed piracies. And so the power has been practically expounded by Congress."

Judge Story never intended the foregoing language to apply to any but a piracy case, as appears by the next section, as follows:

“1160. But the power is not merely to define and punish piracies, but *felonies*, and *offenses against the law of nations*; and on this account, *the power to define*, as well as to punish, is *peculiarly appropriate*. It has been remarked, *that felony is a term of loose signification*, even in the common law; *and of various import* in the statute law of England, etc.

Sec. 1162. But whatever may be the true import of the word ‘felony’ at the common law with reference to municipal offenses, *in relation to offenses on the high seas its meaning is necessarily indeterminate*; since *the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law*. Lord Coke long ago stated that a pardon of felony would not pardon piracy, for ‘piracy, or robbery on the high seas, was no felony whereof the common law took any knowledge, etc., but was only punishable by the civil law, etc.; the attainder by which law wrought no forfeiture of lands or corruption of blood.’ And he added, that the statute of 28 Henry 8, Ch. 15, which created the high commission court for the trial of ‘all treasons, felonies, robberies, murders, and confederacies committed in or upon the high seas,’ etc., did not alter the offense felony, but left the offense as it was before the act, viz. felony only *by civil law*.

Sec. 1163. Offenses against the law of nations are quite as important, and cannot with any accuracy be said to be completely ascertained and defined, in any public code recognized by the common consent of nations. *In respect, therefore, as well to felonies on the high seas, as to offenses against the law of nations*, there

is a peculiar fitness in giving to Congress the power to define, as well as to punish. And there is not the slightest reason to doubt, that this consideration had very great weight with the convention in producing the phraseology of the clause. On either subject it would have been inconvenient, if not impracticable, to have referred to the codes of the States as well from their imperfection as their different enumeration of the offenses. *Certainty, as well as uniformity, required that the power to define and punish should reach over the whole of these classes of offenses."*

It is clear from the foregoing, that the farthest Judge Story went is as follows:

1st. He held that a reference to the law of nations was a sufficient definition of piracy.

2nd. That the common law never applied to offenses committed on the ocean.

3rd. That offenses committed on the ocean were governed and controlled entirely by the civil law.

4th. That *felonies* and offenses against the law of nations *must be defined, or no crime existed*.

What the decision states, as quoted by the Court in this case, is dictum. It will be noted that the Smith case does not mention the cases of *U. S. vs. Hudson*, 7 Cranch 31, and *U. S. vs. Coolidge*, 1 Wheaton 415. And they were not overruled by the Smith case.

Neither of those cases was a piracy case, and in both the Supreme Court decided that in the absence of a definition of the crime, the crime did not exist.

We also respectfully call the Court's attention to the fact that piracy became an obsolete offense about the time the Smith case was decided; there has been no opportunity of any review of it as a piracy case. It has unquestionably been overruled, however, by the language of other cases. See those cited in our brief, and the following, among other language quoted:

Tennessee vs. Davis, 100 U. S. 275.

“That the legislative authority of the Union must *first make an act* a crime, affix a punishment to it and prescribe what courts have jurisdiction of such an indictment.”

The last expression of opinion of the United States Supreme Court on the absolute requirement of a statutory definition of crime, is found in

In re George, 228 U. S. 14-22.

That Court saying on page 22:

“Where the charge is of crime it must have clear legislative basis.”

We submit that that language does not permit the creation of a crime by designation.

Certainty is what all persons are entitled to in a criminal case, everyone has a right to know whether he is committing a crime or not, as we have asked heretofore where are we to ascertain what constitutes rape in this case? According to Lord Coke and Judge Story, common law crimes never existed and were never recognized on the high seas; the

civil law were. Again the United States Courts do not recognize common law crimes. Of what crime then was Oliver convicted? Where are we to find the civil law definition of rape? And does the indictment set forth the facts required by the civil law? There is no proof that it does, or that there was any such crime at civil law.

We have taken the liberty of writing very fully on this subject, for the reason that we believe this is a case of great importance, if one offense can be created by designation and not defined, all others can be designated by name likewise. Suppose the whole criminal law read about as follows:

Whoever shall commit the crime of white slavery, shall be punished, etc.

Whoever shall commit the crime bribery, shall be imprisoned, etc.

Whoever shall commit the crime of smuggling, shall be imprisoned, etc.

Whoever shall commit the crime of counterfeiting, shall be imprisoned, etc.

What condition would ^{the} criminal code then be in? It was the intention of the Constitution framers to have the act defined. The foregoing extracts show the necessity for such intention, and we respectfully submit that it would be establishing a very dangerous precedent for any decision to stand that would place the criminal law in the state of uncertainty

that existed for centuries, centuries ago, when in some instances as has been stated, criminal laws were printed on high rocks and places where no one could read them. In the case at bar, a similar state of uncertainty exists.

In the trial of criminal cases, it sometimes happens that the true facts of a case are not developed, particularly in a case where none but the accuser and the defendant are the only material witnesses, the writer of this petition, together with others, able and disinterested parties, that have since Oliver's trial investigated this case fully, are confident that while the evidence in this may have justified the verdict, that Oliver is being punished for a crime that he never committed. And for that reason the writer feels a deep interest in the results of his case.

We respectfully submit that this petition for a reconsideration of the case should be granted.

Respectfully,

H. W. HUTTON,
Attorney for Petitioner.

I hereby certify, that, in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

H. W. HUTTON,
Attorney for Petitioner.

United States
Circuit Court of Appeals

For the Ninth Circuit.

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs in Error,
vs.

VIRGINIA & GOLD HILL WATER COMPANY, a
Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

Filed

APR 19 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANERI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY
(a Corporation),
Defendants.

Third Amended Complaint.

Come now the plaintiffs, and by leave of Court first
had, file this their Third Amended Complaint, and
aver:

I.

That Rose Bright is a married woman, and the
lawful wife of Richard Bright, and that by reason
thereof said Richard Bright is impleaded herein as
plaintiff.

II.

That the Virginia & Gold Hill Water Company is a
corporation duly incorporated under and by virtue of
the laws of the State of California, and is now, and
at all the times herein mentioned, was and is, a cor-
poration, transacting business in the County of
Ormsby, State of Nevada, and the County of Storey,
in said State, as a water company, impounding,
ditching, fluming, storing and distributing water for
the purposes of irrigation and domestic uses for pay,
in said County of Ormsby and the County of
Storey, in the State of Nevada.

III.

That for more than thirty years last past, the plaintiffs Rose Bright and Michele Bucchianeri, and their predecessors in [1*] interest, have been the owners of and in the exclusive possession of, and entitled to the exclusive possession of the following described lands and water rights connected therewith, to wit:

All of that portion of the northeast quarter of the southeast quarter of Section 36, Township 16 North, Range 19 East, M. D. B. & M., embraced in the following described boundaries:

Beginning at a stone monument marked "A" near the western boundary of said northeast quarter of southeast quarter, running thence easterly in the direction of a large stone with a black spot on it to a point where said line crosses the eastern boundary line of said northeast quarter of southeast quarter, thence north to the northeast corner of said northeast quarter of southeast quarter, thence west along the northern boundary line of said northeast quarter of southeast quarter to a point due north of said monument marked "A," thence south to place of beginning, containing 25 acres more or less.

Also the south half of lot 2, in the southwest fractional quarter of Section 31, Township 16 North, Range 20 East, M. D. B. & M.

Also the southeast quarter of the southeast quarter of Section 36, Township 16, North of Range 19 East, M. D. M.

Also that portion of the northeast quarter of the southeast quarter of Section 36, Township 16 North,

*Page-number appearing at foot of page of original certified Record.

Range 19 East, M. D. M., lying south of the line drawn as follows:

Commencing at a point about ten feet north of a small group of springs near the west line of said last-named tract, and running southwesterly through a large granite rock lying just below the upper toll road, said rock being one-fourth of a mile more or less from said springs, said land being 4 chains in width on the eastern boundary line of said 40-acre tract and 6.3 chains on the western boundary line.

Also all water, water rights, ditches, flumes and springs, appertaining or belonging thereto or used in connection therewith. [2]

IV.

That for fully forty years last past and continuously, the defendant Virginia & Gold Hill Water Company, by means of dams, ditches, fluming, piping and impounding waters, and by the use of tanks, has diverted the waters of a certain lake in the County of Washoe, State of Nevada, called Marlette Lake, and carried and conducted said waters to Virginia City and Gold Hill, in the County of Storey, State of Nevada, for mining, agricultural and domestic uses; that on or about the time of the building and construction of its said dams, pipes, flumes, tanks and impoundment of waters, by said defendant, said defendant caused and permitted an overflow of the waters so appropriated by it, to flow down into and along a certain natural channel or ravine, to the aforesaid above-described lands and premises, and the said defendant to prevent the waters thus overflowing down and through said natural channel

or ravine from flowing upon said land and premises, dug outside of and along the north side of said lands and premises, a ditch to convey said overflow water away from said lands and premises, but the said ditch proved insufficient and insecure and the same broke and gave way, and said overflow of waters came down to, over and across said lands and premises, and cut out and washed away portions thereof, and cut ditches in said lands and premises, and destroyed a garden thereon, and did large and considerable damage to said lands and premises, to the injury of the said Joe Garavanta, and thereupon he the said Joe Garavanta then and there being the owner, possessed and entitled to the possession of said lands and premises, threatened the said defendant and began to prepare to bring suit against said defendant for the damages and injuries which he had sustained by reason of the said overflow of said waters upon the said lands aforesaid, and thereupon the said defendant and the said Joe Garavanta then and there orally agreed by and between them that the said Joe Garavanta should permit the said overflow waters [3] to flow down to and across his said lands, and that the said defendant should have the right of way for said overflow waters, to and across and over the said lands of the said Joe Garavanta, and continue said overflow waters at all times, and in consideration therefor the said defendant would continue and permit the said overflow waters to flow down through said natural channel or ravine to the said lands and premises aforesaid, during the whole time it was engaged in the furnish-

ing of water in pursuance of its incorporation, and that the said Joe Garavanta and his successors in interest, should have the right to divert the said waters and use the same to irrigate the said lands and premises to the extent in which the said overflow water then and there ran, as long as said defendant was engaged in the business of its incorporation, and conducted and carried on its said business as hereinbefore averred. And that the said Joe Garavanta and his successors in interest, should have all of said overflow waters continuously and without interference, for the irrigation of the said lands and premises, free of charge, and the same should be permitted to overflow. And in pursuance of said agreement and in consideration of the use of the said waters upon said lands and premises, for the purposes of irrigation, said Joe Garavanta waived his right of action for damages for the injuries he had sustained, and gave and permitted and consented that the said overflow and waste waters from the works of the said defendant to run down said natural channel and ravine, and gave and granted to the said defendant a right of way therefor, through the aforesaid lands and premises. And the said defendant gave and granted to said Joe Garavanta, and his successors in interest, the right to use said waters as hereinbefore averred, and the said waters so flowed in sufficient amount and quantity and extent to enable the said Garavanta, during the irrigation seasons of the year, for years to irrigate said lands and premises to the extent of at least one hundred acres, and he began [4] the use thereof with the

full knowledge, consent and agreement of the said defendant, and irrigated at least one hundred acres of the said lands and premises aforesaid, during his ownership and occupancy of said lands and premises, for a period of not less than seven years. That he planted an orchard, put out various vines, planted a garden, cultivated nearly one hundred acres of said lands and premises in various annual crops, expended large sums of money and expended months of time and labor to enable him to use, for the purpose of irrigation said waste water and overflow waters in pursuance of the agreement aforesaid.

That thereby said lands and premises were greatly increased in value; that the said Joe Garavanta so occupied the said lands and premises, and so used the overflow waters as aforesaid, under said agreement, for a period of at least seven years, when he sold said lands and premises to G. Raffetto, through whom and by *mean conveyance* said lands and premises have vested in fee in these plaintiffs; together with the right to use said waters as aforesaid. That since the aforesaid agreement down to and including the years 1913, and continuously, the said plaintiffs, their predecessors and grantors, in pursuance of said agreement, have used the said overflow waters, and the same have overflowed and continued to overflow, and the said defendant has permitted the same, in harmony with said agreement, to overflow, for the purposes of irrigation of said lands and premises aforesaid.

That said lands of said plaintiffs are arid lands and that crops cannot be grown thereon or matured

without irrigation, but that with irrigation large and valuable crops of garden produce, horticultural products, grain, grasses and vegetables, can be, have been and are now being grown by the plaintiffs upon said lands, and that all of said waters hereinbefore mentioned are necessary for the proper irrigation and cultivation of said lands, and said waters have been for more than forty years last past, in [5] pursuance of said understanding and agreement aforesaid, continuously used upon said lands for irrigation purposes, with the full consent, agreement and knowledge of said defendant, and at all the times herein mentioned said overflow waters continued to overflow and were permitted to overflow by said defendant, and were not needed elsewhere or at all.

V.

That during the year 1913, said plaintiffs planted said lands in fields of grain, garden products, alfalfa, strawberries, potatoes and divers and sundry annual crops, and had then and there certain of said lands in orchard trees of divers and sundry kinds, as heretofore raised and cultivated, and by virtue of said irrigation as hereinbefore had, was of great value to said plaintiffs, and the said plaintiffs to enable them to plant said crops aforesaid, were compelled to and did expend in cost of labor therefor, the sum of \$1953.96, in the planting, plowing and cultivation of said crops, and the said crops so planted and cultivated were in good condition and growing splendidly, and the season was favorable to the usual yield and advantage to the plaintiffs, and said over-

flow waters were being used by said plaintiffs, and were overflowing as heretofore, and there was plenty of water for the purposes herein stated, and no loss or reduction of the quantity of water, for the uses and purposes of said defendant and to enable it to keep its agreement, on or about June 24th, 1913, when wrongfully and unlawfully the said defendant cut off, diverted and stopped the said overflow of waters as aforesaid, and wholly deprived the said plaintiffs of the use thereof, in violation of its said agreement, during the cropping season of same year, destroying the said crops, and all means of the irrigation of said lands from all the sources hereinbefore set forth, and ruined and wholly destroyed said crops, to the damage of these plaintiffs in the sum of Fourteen Thousand Eight Hundred and Twenty-three Dollars (\$14,823.00). [6]

WHEREFORE plaintiffs pray judgment against the said defendant in the sum of \$14,823.00, and costs of suit.

SWEENEY & MOREHOUSE,

Attorneys-at-Law.

State of Nevada,

County of Ormsby,—ss.

Mrs. Rose Bright and M. Bucchianeri, being duly sworn, each for himself or herself, says: That they and each of them have heard read the foregoing complaint, and knows the contents thereof, and that the same is true of his or her knowledge, except as to the matters therein stated on information or belief, and as to those matters they and each of them

believe the same to be true.

MRS. ROSE BRIGHT.

M. BUCCHIANERI.

Subscribed and sworn to before me this 17th day of July, 1914.

[Seal]

JAMES G. SWEENEY,

Notary Public in and for the County of Ormsby,
State of Nevada. [7]

State of Nevada,

County of Ormsby,—ss.

Mrs. Rose Bright and M. Bucchianeri, being duly sworn, each for himself or herself, says: That they and each of them have heard read the foregoing complaint as amended in writing by authority of Court granted Sept. 9th, 1914, and knows the contents thereof, and that the same is true of his or her knowledge except as to the matters therein stated on information or belief, and as to those matters they and each of them believe the same to be true.

ROSE BRIGHT.

M. BUCCHIANERI.

Subscribed and sworn to before me this 9th day of September, 1914.

[Seal]

JAMES G. SWEENEY,

Notary Public in and for the County of Ormsby,
State of Nevada.

Due and personal service of the within Third Amended Complaint by copy thereof is admitted this 18th day of July, 1914.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendant.

[Endorsed]: No. 1682. In the United States District Court of the State of Nevada. Rose Bright, et al., Plaintiffs, vs. Virginia & Gold Hill Water Company (a Corporation), Defendant. Third Amended Complaint. Filed July 20, 1914. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Plaintiffs, Reno and Carson City, Nevada. [8]

*In the District Court of the United States for the
District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANERI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
a Corporation,

Defendant.

**Demurrer to Third Amended Complaint as Amended
September 9, 1914.**

Now comes the above-named defendant and demurs to the plaintiffs' third amended complaint, in the above-entitled action, as amended September 9, 1914, on the following grounds:

1. That said amended complaint does not state facts sufficient to constitute a cause of action.

2. That the oral agreement set forth in said complaint is void and of no effect because it is not in writing, and is in violation of that section of the statute of frauds, which is section 1069, of Vol. 1, Revised Laws of Nevada, in that it attempts to create,

grant or assign an estate or interest in land other than the lease for the term not exceeding one year by an agreement not in writing.

3. That the oral agreement set forth in said complaint is void and in violation of that portion of the statute of frauds, which is section 1075, of Vol. 1 of the Revised Laws of Nevada, in that said agreement is not to be performed within one year from the making thereof. [9]

4. That said amended complaint is insufficient and does not state a cause of action, in that it does not appear therefrom that there was no other source from which plaintiffs could obtain water for irrigation of their said lands in the year 1913.

5. That said amended complaint is uncertain in that it cannot be ascertained therefrom when the alleged agreement between Joe Garavanta and the defendant was made.

6. That said amended complaint is uncertain in that it cannot be ascertained therefrom with what officer or agent of the defendant company said oral agreement was made by said Joe Garavanta.

7. That said amended complaint is uncertain in that it cannot be ascertained therefrom whether the person or persons with whom said Joe Garavanta made said oral agreement were the officers or agents of said defendant, or authorized or empowered to make said agreement for and on behalf of the said defendant.

8. That said amended complaint is uncertain in that it cannot be ascertained therefrom the extent or value of the consideration which the said Joe Gara-

vanta paid or surrendered for said oral agreement with said defendant.

9. That said amended complaint is insufficient and does not state facts sufficient to constitute a cause of action therein which is on the law side of the Court, on the ground and for the reason that the allegations of plaintiff's complaint show that his remedy is not by an action at law, but by injunction and bill in equity, and this Court is without jurisdiction to entertain the same as an action at law.

WHEREFORE, the defendant prays that this demurrer be sustained, and plaintiffs' suit be dismissed with costs.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendant. [10]

[Endorsed]: No. 1682. In the District Court of the United States for the District of Nevada. Rose Bright et al., Plaintiffs, vs. Virginia & Gold Hill Water Company, a Corporation, Defendant. Demurrer to Third Amended Complaint as Amended September 9, 1914. Due service of the within by copy, admitted Sept. 19, 1914. Sweeney & Morehouse, by L. F. Thomas, Attorney for Plaintiffs. Filed this 21st day of September, 1914. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Defendant.

[Order Sustaining Demurrer, etc.]

JOURNAL ENTRY OF DATE OCTOBER 24th,
1914, SHOWING DISPOSITION OF DEMURRER TO THIRD AMENDED COMPLAINT, AS AMENDED.

ROSE BRIGHT et al.

vs.

VIRGINIA & GOLD HILL W. CO.

The demurrer to the Third Amended Complaint as amended on the face thereof, heretofore submitted, having been duly considered by the Court, it is now ORDERED that the same be, and is hereby, sustained; and that the plaintiffs are given twenty-five days within which to take such further steps as advised. [11]

*In the District Court of the United States for the
District of Nevada.*

No. 1682.

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANERI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY, a
Corporation,
Defendant.

Judgment.

BE IT REMEMBERED that in the above-entitled action the demurrer of the defendant to the last-

amended complaint of said plaintiffs having been sustained on the ground that said amended complaint did not state facts sufficient to constitute a cause of action, and leave to the plaintiffs to further amend their said complaint if they so desired having been heretofore given, and the time therefor subsequently extended, and said time having fully expired, and said plaintiffs having declined to further amend said complaint;

NOW, THEREFORE, by reason of the law and the premises, and upon motion of the attorneys for said defendant, it is ORDERED, ADJUDGED and DECREED that the said plaintiffs take nothing by their said complaint and that the defendant have judgment for its costs herein, taxed at \$——.

Done in open court this 30th day of December, 1914.

E. S. FARRINGTON,
District Judge. [12]

[Endorsed]: No. 1682. In the District Court of the United States for the District of Nevada. Rose Bright et al., Plaintiffs, vs. Virginia & Gold Hill Water Company, a Corporation, Defendant. Judgment. Filed this 30th Day of December, 1914. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Attorneys for Defendant. [13]

[Opinion.]

*In the District Court of the United States, in and for
the District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANERI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY, a
Corporation,

Defendant.

SWEENEY & MOREHOUSE, for Plaintiffs.
CHENEY, DOWNER, PRICE & HAWKINS,
for Defendant.

FARRINGTON, District Judge:

The complaint shows that for the last forty years defendant has been transporting water from Marlette Lake to Virginia City, and that it has caused and permitted a surplus of the waters so appropriated to flow across plaintiffs' premises. Some thirty years ago this water seriously damaged the premises, which were then owned by one Joe Garavanta. Garavanta was on the point of beginning an action when the matter was settled by an oral agreement, under which Garavanta agreed to permit the water to flow across his premises, and the company agreed to allow him to make use of it for agricultural purposes. For at least seven years plaintiffs and their grantors have used the water in the irrigation of at least one hundred acres of land; they have planted

an orchard, put out various vines, made a garden, and expended large sums of money and months of labor to secure the beneficial use of this overflow water. [14]

During the year 1913 plaintiffs had large and valuable crops growing on these premises, which they were irrigating with the full consent, agreement and knowledge of the defendant; and at all times mentioned in the complaint these overflow or waste waters continued to overflow, and were permitted to overflow by the defendant, and were not needed elsewhere, or at all. The amount expended during the year 1913 in planting crops on plaintiffs' said premises was \$1,953.96. On or about June 24, 1913, while the waters were so overflowing, and there was plenty of water for the purposes of irrigation, and no loss or reduction in the quantity of water, the defendant, in violation of said agreement, wrongfully and unlawfully cut off and stopped said overflow of water, and wholly deprived plaintiffs of the use thereof during the cropping season of that year, to plaintiffs' injury in the sum of \$14,823.00.

To this complaint defendant has demurred on numerous grounds. The most important objections are as follows:

First: The complaint does not state facts sufficient to constitute a cause of action;

Second: The agreement is void and of no effect, because not in writing, and is in violation of the Nevada statute of frauds, in that it attempts to create, grant or assign an estate or interest in land other than a lease, for a term not exceeding one year,

by an agreement not in writing; and in that the agreement is not to be performed within one year from the making thereof.

It is claimed by defendant that the agreement set out creates merely a license which may be revoked at any time by defendant company. While conceding this as a general principle, plaintiffs contend that under the peculiar circumstances of the case, in view of the fact that they had expended so large a sum of money in planting crops, all of which was known and understood by defendant, defendant could not revoke the license at the time [15] it is alleged to have done so, and cut off the flow of waste water, without rendering compensation for the injury. In support of this position they have cited the case of *Lee v. McLeod*, reported in 12 Nevada, page 280.

In that case the Supreme Court of Nevada held that a parol license to erect a dam upon another's land for the purpose of running a flour mill, is irrevocable after the party to whom the license is given has executed it by erecting the mill, or otherwise expending money upon the faith of the license; the expenditure of money in consequence of the license has the effect of turning such a license into an agreement that will be enforced in equity; the execution of the parol license supplies the place of a writing, and takes the case out of the statute of frauds.

In that case it appeared that after granting the license to erect the dam, after the dam had been constructed and a flour mill had been erected, to be operated by use of waters impounded in the dam, the

grantor went further up the stream and diverted the water away from the dam and mill. Lee then brought suit against the grantor McLeod to recover damages for the unlawful diversion of the water, and asked an injunction against further diversions. A judgment of nonsuit in the lower court was reversed.

That case differs quite materially from the one now in hand. The allegation is that "defendant diverted and stopped the said overflow of water as aforesaid." In other words, the defendant failed to divert enough water from Marlette Lake to create an overflow and a waste which would run down to plaintiffs' premises. This, I understand, is conceded to be the effect of the allegation.

If this is sufficient to constitute a cause of action, then defendant was not only bound under its oral agreement to permit plaintiffs to use the waste water once it had escaped from the flumes, but it was bound to actively supply and create a sufficient [16] amount of waste water to irrigate plaintiffs' premises, after plaintiffs had put in a crop.

It does not seem to me that the facts set out in the complaint, or the agreement itself, are sufficient to lay upon defendant any such a burden. The failure of defendant to create such an overflow is not a revocation of a license; it is a failure to perform an affirmative act.

If during all this time there had been an actual overflow from defendant's flumes, which at some lower point above plaintiffs' premises was diverted by the defendant as actual waste water, then we should have a situation very similar to that pre-

sented in the case of Lee vs. McLeod, and the rules there announced would be applicable. If in that case it had been a question as to whether McLeod under his oral agreement was bound to take such active measures as were necessary to insure a sufficient quantity of water at plaintiff's dam to run the mill, in my judgment the decision of the Supreme Court would have been quite different.

The demurrer is sustained, and plaintiffs are allowed twenty days within which to take such steps as they may be advised.

[Endorsed]: No. 1682. In the District Court of the United States, in and for the District of Nevada. Rose Bright and Richard Bright, Her Husband, and M. Bucchianeri, Plaintiffs, vs. Virginia & Gold Hill Water Company, a Corporation, Defendant. Opinion. Filed October 24th, 1914. T. J. Edwards, Clerk. [17]

*In the District Court of the United States, in and
for the State of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of
said District Court:

The plaintiffs, Rose Bright and Richard Bright,

her husband, and M. Bucchianari, by their attorneys, Messrs. Sweeney & Morehouse, respectfully show:

That heretofore, to wit, on the 1st day of August, 1913, said plaintiffs filed an action against the said defendant, in the District Court of the First Judicial District of the State of Nevada, in and for the County of Ormsby, and due service of process, was made on said defendant, and that thereupon said defendant, by proper proceedings, caused said action to be removed to the said District Court of the U. S. above named, and the proceedings and demurrers were heard until said plaintiffs filed their third amended complaint, to which said defendant filed a demurrer, and which said demurrer was duly argued and submitted and the Court thereafter by written opinion sustained said demurrer, and said plaintiffs declining to amend said third amended complaint, within the time fixed by order of the Court, the said defendant caused a final [18] judgment to be and entered in said cause against said plaintiffs and in favor of defendant, which said final judgment was entered on the 30 day of Dec., 1914, against your petitioners.

Your petitioners, feeling themselves aggrieved by the said judgment so entered as aforesaid, herewith petition the said District Court of the United States, for the District of Nevada, for an order allowing them to prosecute a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting in San Francisco, State of California, under the laws of the United States in such cases, made and provided.

WHEREFORE, your petitioner prays that a Writ of Error do issue, and that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting in San Francisco, in said Circuit Court, for the correction of the errors complained of, and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiff, conditional as the law directs.

SWEENEY & MOREHOUSE,
Attorneys for Plaintiff.

[Endorsed]: In the District Court of the United States in and for the District of Nevada. Rose Bright, and Richard Bright, Her Husband, and M. Bucchianari, Plaintiffs, vs. Virginia & Gold Hill Water Company, Defendant. Petition for Writ of Error. Filed this 26th day of February, A. D. 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Plaintiffs.
[19]

*In the District Court of the United States, in and
for the District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
Defendant.

Assignments of Error.

Now comes Rose Bright and Richard Bright, her husband, and M. Bucchianari, plaintiffs above

named, and in connection with their Petition for a Writ of Error, in this cause, makes and files the following Assignments of Errors upon which they will rely in the prosecution of their Writ of Error in the above-entitled cause and upon which they rely to reverse the judgment herein as appears of record:

I.

That the Court erred in sustaining defendant's demurrer to plaintiff's Third Amended Complaint.

II.

That the judgment entered herein is against law, in this, to wit that said complaint contains and states a complete cause of action against said defendant.

III.

That said demurrer should have been overruled, and the cause submitted to trial before a jury and that said judgment is contrary to law and the facts.
[20]

WHEREFORE, the plaintiffs herein, pray, that the judgment herein be reversed.

Dated February 26th, 1915.

SWEENEY & MOREHOUSE,
Attorneys for Plaintiffs in Error.

[Endorsed]: No. 1682. In the District Court of the United States in and for the District of Nevada. Rose Bright and Richard Bright, Her Husband, and M. Buccianari, Plaintiffs, vs. Virginia & Gold Hill Water Company, Defendant. Assignments of Error. Filed this 26th Day of February, A. D. 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Plaintiffs.
[21]

*In the District Court of the United States, in and for
the District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

Upon motion of Messrs. Sweeney & Morehouse, attorneys for the above-named plaintiffs, and upon filing a petition for a Writ of Error and Assignments of Error,

It is ORDERED that a Writ of Error be, and it hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be, and the same is hereby fixed at (\$500.00) Five Hundred Dollars; said bond to serve as a cost bond on said Writ of Error.

Dated February 26th, 1915.

E. S. FARRINGTON,
Judge of the United States District Court for the
District of Nevada.

[Endorsed]: No. 1682. In the District Court of the United States, in and for the District of Nevada. Rose Bright and Richard Bright, Her Husband, and M. Bucchianari, Plaintiffs, vs. Virginia & Gold Hill

Water Company, Defendant. Order Allowing Writ of Error. Filed this 26th day of February, A. D. 1915. T. J. Edwards, Clerk. Sweeney & Morehouse, Attorneys for Plaintiffs. [22]

*In the District Court of the United States, in and for
the District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY
Defendant.

Praeipce [for Transcript of Record.]

To the Clerk of the Above-entitled Court:

Dear Sir: You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the Writ of Error issued herein and now perfected to said Court, and include in said transcript, the following:

Plaintiffs' Third Amended Complaint; the Demurrer thereto; the Opinion of the Court sustaining said Demurrer; the Judgment entered herein upon plaintiffs' failure to further amend their complaint; Petition for Writ of Error; Assignment of Errors; Order Granting Writ of Error; Bond on Writ of Error; Writ of Error; Citation, and this Praeipce; said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the

Ninth Circuit and have the same on file in the office of the clerk of said Circuit (Court) of Appeals, at San Francisco, State of California, before the 28th day of March, 1915.

SWEENEY & MOREHOUSE,
(Attorneys for) Plaintiffs in Error.

[Endorsed]: No. 1682. In the District Court of the United States, in and for the District of Nevada. Rose Bright and Richard Bright, Her Husband, and M. Bucchianari, Plaintiffs, vs. Virginia & Gold Hill Water Company, Defendant. Praecipe. Filed this 26th day of February, A. D. 1915. T. J. Edwards, Clerk. Sweeney & Morehouse, Attorneys for Plaintiff. [23]

*In the District Court of the United States, in and for
the District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we Rose Bright and Richard Bright, her husband, and M. Bucchianari, as principals, and Columbia Rafetto (and) F. L. Wildes of Carson City, Nevada, as sureties, are held and firmly bound unto Virginia and Gold Hill Water Company, the de-

fendant in said above-entitled action in the full amount of (\$500.00) Five Hundred Dollars, lawful money of the United States, to be paid to said defendant, its successors or assigns, to which payment well and truly to be made, we bind ourselves, execution, administrators or assigns, jointly and severally by these presents.

Signed and dated this 26 day of February, 1915.

The condition of the above obligation is that WHEREAS, at a regular term of the United States District Court for the District of Nevada, sitting at Carson City, in said district, in an action at law pending in said court, as hereinabove entitled, Cause No. 1682 on the law docket of said court, final judgment was rendered and entered against said plaintiffs, and in favor of said defendant, upon an order sustaining a demurrer to plaintiffs' action, and [24]

WHEREAS, said plaintiffs have obtained a Writ of Error, and filed a copy thereof in the clerk's office of said court, to reverse the said judgment of the said court in the aforesaid action, and a citation directed to the said defendant in error, citing it to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, in the State of California, according to law, within thirty days from the date hereof.

NOW THE ABOVE OBLIGATION IS SUCH, that if said plaintiffs shall prosecute their Writ of Error to effect and answer all damages and costs if they fail to make good their plea, then this obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF, said plaintiffs and said sureties have hereunto set their hands and seals, this 27th day of February, 1915.

ROSE BRIGHT.

R. T. BRIGHT.

M. BUCCHIANARI.

COLUMBIA RAFFETTO.

F. L. WILDES. [25]

State of Nevada,

County of Ormsby,—ss.

Rose Bright and Richard Bright and M. Bucchianeri, plaintiffs, and Columbia Rafetto and F. L. Wildes, sureties, being each severally duly sworn say: That they and each of them are residents and freeholders, in the County of Ormsby, State of Nevada, and each separately worth the sum of (\$500.00) Five Hundred Dollars, over and above all his just debts and liabilities in property which is not exempt from sale or execution.

ROSE BRIGHT.

R. T. BRIGHT.

M. BUCCHIANERI,

COLUMBIA RAFFETTO.

F. L. WILDES.

Subscribed and sworn to by each of the aforesaid parties, before me this 27th day of February, 1915.

[Seal]

JAMES G. SWEENEY,

Notary Public, in and for the County of Ormsby,
State of Nevada.

My commission expires

The foregoing Bond on Writ of Error is hereby approved this 27th day of February, 1915.

E. S. FARRINGTON,
Judge of the United States District Court for the
District of Nevada.

[Endorsed]: No. 1682. In the District Court of the United States, in and for the District of Nevada. Rose Bright and Richard Bright, Her Husband, and M. Buccianari, Plaintiffs, vs. Virginia & Gold Hill Water Company, Defendant. Bond on Writ of Error. Filed this 27th day of February, A. D. 1915. T. J. Edwards, Clerk. Sweeney & Morehouse, Attorneys for Plaintiffs. [26]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANERI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
(a Corporation),
Defendant.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing twenty-six (26) typewritten pages, numbered from 1 to 26, inclusive, to be a full, true and correct copy of the record and of all

proceedings in said cause and court, and that the same, together with the original Citation and Writ of Error, hereto annexed, constitute the return to the Writ of Error.

I do hereby certify that the costs of the foregoing record is \$26.50, and that the same has been paid by the plaintiffs herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Carson City, Nevada, this 25th day of March, 1915.

[Seal]

T. J. EDWARDS,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled Mar. 25, 1915. T. J. Edwards.] [27]

*In the District Court of the United States, in and for
the District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable
E. S. FARRINGTON, Judge of the District
Court of the United States for the District of
Nevada, Greeting:

Because, in the record and proceedings, as also in
the rendition of the judgment of a plea, which is in

the said District Court, before you, between Rose Bright and Richard Bright, her husband and M. Bucchianari, plaintiffs, and the Virginia & Gold Hill Water Company, defendant, a manifest error has happened to the great damage of the said plaintiffs and each of them, as by said complaint appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same, at the City and County of San Francisco, in the State of California, on the 28th day of March, 1915, in the *Circuit of Appeals*, to be then and there held, that the record and proceedings [28] aforesaid being inspected, the Circuit Court of Appeals, may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable E. S. FARRINGTON,
United States District Judge, for the District of
Nevada, the 27th day of February, 1915.

[Seal]

T. J. EDWARDS,

Clerk of the United States District Court for the
District of Nevada. [29]

[Endorsed]: No. 1682. In the District Court of
the United States, in and for the District of Nevada.
Rose Bright and Richard Bright, Her Husband, and

M. Bucchianari, Plaintiffs, vs. Virginia & Gold Hill Water Company, Defendant. Writ of Error. Filed this 4th day of March, A. D. 1915. T. J. Edwards, Clerk. H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Plaintiffs.

Service by copy of Writ of Error as issued in the above-entitled court and cause accepted this 2d day of Mar. 1915.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendant. [30]

*In the District Court of the United States, in and for
the District of Nevada.*

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANARI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY,
Defendants.

Citation on Writ of Error.

The President of the United States of America, to
Virginia & Gold Hill Water Company, and
Messrs. Cheney, Downer, Price and Hawkins,
its Attorneys, Greeting:

You and each of you are hereby cited and admonished to be, and appear, in the Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within (30) thirty days from and after the date which this citation bears, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United

States, for the District of Nevada, in the above-entitled cause, wherein said parties plaintiff herein, are plaintiffs in error, and the said Virginia & Gold Hill Water Company, are defendants in error, to show cause if any you have, why the judgment made and rendered in said cause on the 30 day of December, 1914, against said plaintiffs and in favor of said defendant, should not be corrected and reversed as prayed in the petition herein and set forth in the writ of error herein, and why justice should not be done to the parties in that behalf.

Witness the Honorable E. S. FARRINGTON,
United States District Judge in and for the District
of Nevada, this 26th day of February, 1915.

[Seal] E. S. FARRINGTON,
Judge of United States District Court for the Dis-
trict of Nevada.

[Seal] Attest: T. J. EDWARDS,
Clerk. [31]

[Endorsed]: In the District Court of the United States, for the District of Nevada. Rose Bright, and Richard Bright, Her Husband, and M. Bucchi-
neri, Plaintiffs, vs. Virginia & Gold Hill Water Company, Defendant. No. 1682. Citation on Writ of Error. Filed this 4th day of March, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

Service by copy of Citation on Writ of Error as issued in the above-entitled court and cause accepted this 2 day of Mar. 1915.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendant. [32]

*In the District Court of the United States for the
District of Nevada.*

No. 1682.

ROSE BRIGHT and RICHARD BRIGHT, Her
Husband, and M. BUCCHIANERI,
Plaintiffs,

vs.

VIRGINIA & GOLD HILL WATER COMPANY
(a Corporation),

Defendant.

Answer to Writ of Error.

The answer of the Judge of the District Court of the United States for the District of Nevada.

The record and all proceedings of the *pliant* whereof mentioned is within *name*, that all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

T. J. EDWARDS,
Clerk. [33]

[Endorsed]: No. 2587. United States Circuit Court of Appeals for the Ninth Circuit. Rose Bright and Richard Bright, Her Husband, and M. Buccianari, Plaintiffs in Error, vs. Virginia & Gold Hill Water Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed March 29, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2587

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROSE BRIGHT, et al.

Plaintiff in Error

vs.

VIRGINIA GOLD HILL WATER COMPANY
(a corporation),

Defendant in Error

BRIEF FOR PLAINTIFF IN ERROR

SWEENEY & MOREHOUSE,

*Counsel and Attorneys for
Plaintiff in Error.*

Filed this-----day of-----, 1915.

FRANK D. MONCKTON, Clerk.

By-----Deputy Clerk.

SEP 23 1915
F. D. Monckton

No. 2587

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROSE BRIGHT, et al.

Plaintiff in Error.

vs.

VIRGINIA GOLD HILL WATER COMPANY

(a corporation),

Defendant in Error.

Brief of Plaintiff in Error.

This writ is taken from a judgment sustaining a demurrer to plaintiff's third amended complaint. The questions are solely of law, based on the facts as set forth in the complaint. The demurrer is upon several grounds, but as the Court, in its opinion, passed only upon the one ground of demurrer, to wit:

"That the complaint fails to state facts sufficient to constitute a cause of action," we shall only brief that point.

The Court cites only one case presented by us, that of

Lee vs. McLeod, 12 Nev. 280

And holds that because we use the words that "the defendant diverted and stopped the said overflow of water as aforesaid" (Trans. p. 18) that this means that the defendant failed to divert enough water from Marlett lake to create an overflow and a waste which would run down to plaintiff's premises.

But the Court overlooked the distinct averment, (Trans. p. 8) "and was overflowing as heretofore, and there was plenty of water for the purposes herein stated, and no loss or reduction of the quantity of water, for the uses and purposes of said defendant and to enable it to keep its agreement." This averment shows clearly, that sufficient waters was diverted by defendant at Marlett lake, to meet every demand, and no change had taken place of any kind, that changed the original condition of affairs.

Now that an oral agreement may become the **basis** of a license, is clearly held in

Lee vs. McLeod, 12 Nev. 280.

Which we cited, for the purpose of showing that a parol contract, when executed, was not within the statute of frauds. Not that, that particular case entitled us to judgment, but that it did establish the rule, that having acted for many years under the parol agreement, and having thus acted to the expenditure of hundreds of dollars and planted a valuable crop, that such license could not be revoked, at a time, which would cause a serious loss, without being compelled to respond in damages for the loss. Such we understand to be the true rule, even under a revocable license.

Flisk, et al, vs. Hill, 42 Pac. 813

Where it is said "Such revocation, followed as it must be, with the absolute forfeiture and loss of defendant's labor and property, would shock the sense of justice of every right minded man, and would be a stain upon the administration of justice," and then this last case holds, if the improvements made under the faith of the license, cannot be removed "that the licensor shall make just compensation therefor, as the circumstances of the case may require."

Now the complaint fully shows the cost of planting the crops, that the water was running and was used as it always had been, that defendants had plenty of water, that it knew the plaintiff had planted their crops and were relying on the use of water, and without any reason, or cause, cut the water off, causing plaintiffs to lose everything. Where the water came from is a matter of no moment, because having the water, and having agreed that the water should be so used, what right had it to cut off the water? If it could not furnish the water that would, probably, be a defense on trial, but does not become a foundation for demurrer. They contracted to furnish the water. Admit such contract to be a revocable license (which we do not admit) yet it cannot revoke such license to plaintiffs' damage without compensating plaintiffs for the loss.

This is certainly the law as laid down by

Renick vs. Kern, 14 Sergeant, Etc 267.

By the Court of Pennsylvania, and while our action is at law, the rule is not changed, because we seek damages, the defendant being fully able to respond.

See the long and splendid note to *Renick vs. Kern*, 16 Am. Dec. 501.

Also see Dec. 983 Ind. 2nd Ed. *Kinney on Irrigation*, etc.

Stoner vs. Zucker, 148 Calif. 516.

Now our contention is, that if the license be revokable or irrevokable, it would be a fraud to stand by, permit and fully authorize a party to use water, and expend a large sum of money upon the faith of an oral contract, and plant crops, raise fruit trees, and then suddenly, without any reason therefor, cut off the supply of water, and cause the licensee a large damage. If such is the law, then law is made to accomplish wrong and injustice. It would certainly shock the sense of honest men to permit a man to make a contract, although it be oral, and then break such contract at pleasure, with the full knowledge that the other party to the contract would be seriously damaged, and then sit back and say, "I don't care, your contract was oral." "I don't owe you anything." Now, such cannot be the law. No doubt the license can be revoked, but we claim it cannot be revoked until such time as the natural term of its continuance for the purpose of raising this year's crop has ended. If revoked before the crop has been produced, after it has been planted, upon the faith of such license, then the licensor is bound to pay the damage, he or it has created.

Curtis vs. La Grande, 20 Ore. 34.

Such an action is one at law, and while the rule of evidence may be equitable, yet plaintiffs were compelled to sue at law, because

By Sec. 723 R. S. of U. S.

Suits in equity shall not be sustained in courts of the United States where plaintiffs have a plain, speedy and adequate remedy at law, and here we have a plain, speedy and adequate remedy in damages, and because the contract was oral, is only a matter of evidence, and not a **remedy** of any kind.

Wherein this complaint is defective and fails to state a **cause** of action, we cannot understand.

Respectfully submitted,


Attorneys for Plaintiff in Error.

No. 2587

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

ROSE BRIGHT, et al.,

Plaintiff in Error,

vs.

VIRGINIA AND GOLD HILL WATER COMPANY,
a Corporation,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

CHENEY, DOWNER, PRICE & HAWKINS,

Counsel and Attorneys for Defendant in Error.

Filed this _____ day of _____

A. D. 1916.

FRANK D. MONCKTON,

Clerk.

By _____

FEB 9 - 1916

Deputy Clerk.

F. D. Monckton

No. 2587

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROSE BRIGHT, et al.

Plaintiff in Error.

vs.

VIRGINIA AND GOLD HILL WATER
COMPANY (a corporation),

Defendant in Error.

Brief for Defendant in Error.

This is an action at law for the recovery of money only as damages for the violation of an alleged oral agreement. The defendant demurred to the plaintiffs' third amended complaint upon several grounds. One ground of the demurrer only was considered by the Court, namely, that the complaint did not state facts sufficient to constitute a cause of action, and the demurrer was sustained upon that ground. The plaintiffs declined to further amend and judgment was entered for the defendant. If the action of the Court in sustaining the demurrer was right for any reason, the judgment should be affirmed.

The claim of the plaintiffs as shown by the said complaint is in substance as follows: That about 40 years ago, defendant permitted certain waste and overflow waters to escape and run down upon certain lands of the plaintiffs' grantor, Joe Garavanta, in such a way as to cause injury thereto; that Garavanta threatened to sue for the damages so caused, and in consequence of the relinquishment of said claim, Garavanta and the defendant agreed by parol that Garavanta would permit said waste and overflow waters to run over and across his lands, and that said defendant gave Garavanta the right to use said waste and overflow waters in the cultivation and irrigation of his said lands. It is further alleged that relying upon said agreement, the plaintiffs and their grantor made improvements upon said lands, with the knowledge of the defendant, and that on the 24th day of June, 1913, the defendant cut off, diverted and stopped the overflow waters and thereby deprived the plaintiffs of the use thereof with the result that the crops growing upon their property were damaged by reason of the loss of said water.

The plaintiffs having thrice amended their complaint, it is but fair to presume that they have now stated their cause of action in the strongest manner which the facts will justify

AMBIGUOUS AND UNCERTAIN AVERMENTS SHOULD BE CONSTRUED MOST STRONGLY AGAINST THE PLAINTIFFS.

"A complaint being tested by a demurrer should be construed most strongly against the pleader."

Cambers v. First National Bank of Butte,
144 Fed. 717; 156 Fed. 482.

"The provision of the Code of Civil Procedure, requiring that the allegations of pleading shall be literally construed, applies only to matters of form. It is still the duty of a party to present a clear and unequivocal statement of his cause of action or defense, and when a material statement is susceptible of two meanings, the one most unfavorable to the pleader must be taken."

Clark v. Dillon, 97 N. Y. 370.

Mallinckrodt Chem. Works v. Nemnich, 69 S. W. 355-8.

Atkins v. Kattman, 97 N. E. 174.

The Supreme Court of California, in an action where a plaintiff had three opportunities to make a good complaint and then failed, said:

"The failure to make a good pleading probably arises in the lack of facts, rather than in the fault of the pleader."

Dukes v. Kellog, 60 Pac. 44.

"The plaintiff undertook to plead all of the circumstances of the transaction, apparently in anticipation of any defense which might be available to the defendant. He is bound by the facts pleaded in his complaint; and, as it is apparent upon the face of the complaint, that those facts do not and cannot be made to state a cause of action upon a completed and valid contract, the demurrer was correctly sustained, without leave to amend."

Burki v. Pleasanton School Dist., 123 Pac. 546, 548.

Before the plaintiffs can maintain any action, it must appear that there was a valid and legal agreement which obligated the defendant to deliver to the plaintiffs the said waste and overflow waters at the time it was alleged they were deprived thereof by the defendants, and that the plaintiffs have broken that agreement; or that although the plaintiffs had no legal agreement which entitled them to the water claimed, yet by reason of the acts and conduct of the parties, equity will convert the invalid parol agreement into a license, which defendant can only revoke upon reasonable notice, which was not given; or a license which is irrevocable.

THE ALLEGED AGREEMENT IS NOT ENFORCEIBLE.

The alleged agreement which plaintiffs seek to establish, and, then to enforce, relates to and is of and concerning lands; it is not a lease for any term whatever; it is not in writing, but it is alleged to be an oral agreement; it is not by its terms to be performed within one year from the making thereof, but on the contrary, it was for an indefinite time. Therefore the alleged agreement, if made, is void and in contravention of the Statute of Frauds of Nevada, being sections 1069 and 1075, 1 Revised Laws of Nevada.

“Sec. 1069. Statute of Frauds—Lease for one year.

“Sec. 55. No estate, or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall

hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing."

"Sec. 1075. Statute of Frauds—Agreements not in writing, when void.

"Sec. 61. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith: First, every agreement that, by the terms, is not to be performed within one year from the making thereof; second, every special promise to answer for the debt, default, or miscarriage of another; third, every promise or undertaking made upon consideration of marriage, except mutual promises to marry."

While a parol agreement within the Statutes of Fraud may be a justification for what has been done under it, yet it is the general rule "that no action can be brought to charge the defendant in **any way** upon his verbal agreement not put in writing according to the statute."

Brown on Statute of Frauds, Sec. 134.

"No action at law can be maintained to recover damages for its breach."

2 Page on Cont. Sec. 740.

That the alleged agreement is void because in contravention of said sections of the statute, is

the second and third grounds of defendant's demurrer to said third amended complaint. (Trans. pp. 10-11.)

THE DEFENDANT HAS NOT BROKEN THE ALLEGED AGREEMENT

It clearly appears from the third amended complaint that the water referred to, and which constituted the subject matter of the agreement, was the "overflow and waste water" from the flume of the defendant. It was the "overflow" of the waters which it is alleged ran down and across the premises, causing damages for which plaintiffs' grantor threatened suit. It was the "overflow waters" which the said grantor agreed to permit to flow down and across his lands. It was the "overflow waters" that the said Joe Garavanta and his successors in interest had a right to use, without interference by the defendant, for the irrigation of said lands, and the right of way which the said Joe Garavanta gave and granted to the defendant was for "the said overflow and waste waters from the works of said defendant to run down said natural channel and ravine." (Trans. p. 5.)

The act of the defendant of which complaint is made, is that H "cut-off, diverted and stopped the said overflow of waters." (Trans. p. 8.)

The amount of said waste and overflow waters or the use made of them by the plaintiffs, or their grantor, throws no light upon the vital question, whether the defendant had agreed to create at all times any overflow or waste waters whatever. It is the contention of the defendant in error that the

alleged agreement, as stated, is nothing more than that the defendant agreed with the grantor of the plaintiffs that if he did not prosecute his said suit for damages, he might have the use, without interference from the defendant, of whatever waste and overflow water there was after it left the works of the defendant. It was not claimed upon the argument of the demurrer that the defendant had in any way interfered with any waste or overflow water after it left defendant's flume. It was conceded upon the argument of the demurrer that the effect of plaintiff's allegations are, that the only way defendant had interfered with any overflow or waste water, is that it had failed to divert into its flumes and works a sufficient amount of water to create any overflow or waste water. The allegations of the complaint were so understood by the Court. (Trans. p. 18.)

For one party to agree with another that he may have whatever overflow and waste water there is from his premises, is quite different from agreeing that he will maintain or continue the flow of any waste water whatever. If there was in fact waste and overflow water which the defendant diverted after it became waste or overflow water, such a diversion might constitute a violation of the agreement stated, but as it is conceded that the act complained of is that the defendant prevented there being any overflow by not diverting into its flumes enough water to cause the water to waste or overflow, the District Court very properly held, upon that ground, that the complaint did not state a cause of action.

As soon as any of the water which the defendant diverted into its flumes became overflow or waste

water, the plaintiff's title or right thereto ended.

It has been held by the Supreme Court of Nevada that as soon as this defendant discharged water from its flume, it became abandoned water and the lease by this defendant of those waters gave the lessee no right thereto.

Schulz v. Sweeney, 19 Nev. 359-360.

DOUBTFUL AVERMENTS WILL NOT BE SO CONSTRUED AS TO MAKE AN UNREASONABLE OR IMPROBABLE AGREEMENT.

It is the theory of plaintiffs' complaint that their lands were improved and cultivated and made valuable by the use of water thereon for 40 years, the right to which they obtained by reason of the alleged agreement. These lands, therefore, could have been of no considerable value at the time Joe Garavanta threatened to sue defendant for damages caused by their overflow, and no considerable damage could have been caused thereby. It will not be presumed that parties enter into improbable or unreasonable agreements, having in view the surrounding circumstances.

"Where the language of a contract is obscure or ambiguous, or its meaning is doubtful, so that it is susceptible of two constructions, that interpretation which evolves the more usual, reasonable, and probable contract should be adopted."

Pressed Steel Car Co. v. Eastern Ry. Co., 121 Fed. 609.

Bell v. Bruen, 1 How. 169, 186.

Coglan v. Stetson, 19 Fed. 727, 729.

Jacobs v. Spalding, 71 Wis. 177, 186; 36 N. W. 608.

Russell v. Allerton, 108 N. Y. 288, 292; 15 N. E. 391.

It is not reasonable to suppose that the defendant corporation, which was engaged in furnishing water to Virginia City and which might at any time have a demand for all or more than it could supply, would, in settlement of the trivial damages for which it might be liable under the claim made by Joe Garavanta, have obligated itself to create or furnish at any time any waste water, and especially is it unreasonable and improbable that the defendant agreed to continue an overflow which the plaintiffs say was sufficient to irrigate 100 acres of land. Before any such contract should be declared, it should be alleged in the most unequivocal terms, and the allegations of the complaint being ambiguous, they should be construed as intending to mean, and as the District Court understood that it did mean, that the defendant only agreed to the plaintiffs' use of such waste or overflow water as might escape from its flume—not to create or continue an overflow.

The continued use of waste water creates no right to have the discharge continued.

"The better authorities hold that a claimant to waste water acquires a temporary right only to whatever water escapes from the works or lands of others, and which cannot find its way back to the natural stream from which it was taken; that such a use of the water does not carry with it the right to any specific quantity of water, nor the right to interfere with the water flowing in the ditches or works of others lawfully appropriating it, that the appropria-

tors are under no obligation, nor have they the right to permit any specific quantity of water to be discharged as 'waste water' for his benefit."

2 Kinney on Irrigation & Water Rights, 2 Ed. 1153.

Cardelli v. Comstock Tunnel Co., 26 Nev. 284.

THE FACTS STATED DO NOT CREATE A LICENSE.

We understand it to be the plaintiffs' contention that the defendant has given them a license to use the water of which it has been deprived, which license might be revoked but could only be revoked upon reasonable notice. It is the defendant's contention that the right, if any, to the use of the overflow and waste waters which the plaintiffs acquired under said agreement is not a license.

The term "license" as used in respect to rights in real property, has a fixed and uniform meaning. It is,

"An authority to do a particular act or series of acts upon the land of another without possessing any estate therein."

25 Cyc. 640.

Bouvier's Law Dictionary, "License."

Anderson's Law Dictionary, "License."

The fundamental feature of a license is that it gives the licensee the right to do something not upon his own land, **but upon the land of the licensor**. Under the facts pleaded, the plaintiffs' grantor gave the defendant a license, to-wit, a certain right of way for waste water across his lands. The plaintiffs only acquired a right to take and use

upon their own lands certain waters which flowed to them.

Neither the plaintiffs nor their grantor acquired any license, because they have no right whatever to enter upon any of the lands of the defendant or do any act thereon whatever.

The plaintiffs admit that the so-called license which they claim, was revocable, and say,

“No doubt the license can be revoked, but we claim it cannot be revoked until such time as the natural term of its continuance for the purpose of raising this year’s crop has ended.”

Brief, p. 4.

Where improvements have been made upon the lands of another, relying upon a revocable license, the courts have sometimes held that notice of revocation is required. The only purpose of this notice is to enable the licensee to remove the improvements which he has placed upon the lands of the licensor.

“Where a licensee has movable property on the premises, he should be given reasonable notice of a revocation of the license and an opportunity to remove it. But where the termination of the license necessitates no removal of property, no notice is necessary.”

25 Cyc. 652.

Archer v. C. M. & St. P. Ry. Co. (Mont.) 108 Pac. 571.

Profile Cotton Mills v. Calhoun W. Co. (Ala.) 66 So. 51.

The rule, in some jurisdictions, that notice and

a reasonable opportunity to remove improvements from the lands of another are necessary, before the license can be revoked, is here mentioned for the purpose of emphasizing the fundamental proposition relating to licenses; namely—that it is a permission to do something upon the lands of another, and to make it manifest that in the present case, plaintiffs have no license whatever, have nothing to remove from the defendant's lands, and consequently are not entitled to any notice of its revocation.

We do not care to discuss, because it is not involved in this case, whether a burden or interest in land can be created by acts done under an oral agreement, which is void under the Statute of Frauds. The conflict of authorities upon this proposition seems hopeless, but it is believed that the better doctrine is that a parol license can never impose an irrevocable burden on land because as soon as the burden is established, it becomes an estate or an easement, which is an interest of a higher grade than a license, and can only be created by an instrument in writing, and it is noteworthy that several of the States which departed from that doctrine have returned to correct principals in their later decisions.

Note, 49 L. R. A. 526.

PLAINTIFFS' AUTHORITIES ARE NOT APPLICABLE.

Each of the cases on which plaintiffs rely is clearly a case of a license. In *Lee v. McLeod*, 12 Nev. 281, the license consisted in the construction of a dam and digging of a ditch upon the lands of

the defendant by which water was diverted for the plaintiff.

Flick v. Bell, 42 Pac. 813, was a suit for injunction to enjoin the removal of pipes and a reservoir constructed by plaintiff on defendant's land.

In *Rerick v. Kern*, 4 S. & R. 267; 16 Am. Dec. 497, the plaintiff had built a dam on the lands of the defendant to divert waters for a saw mill.

In *Stoner v. Zucker*, 148 Cal. 156; 83 Pac. 808, the defendant had given the plaintiff permission to enter upon his land and construct a ditch for irrigating purposes.

In *Curtis v. La Grande Water Company*, 23 Pac. 809, the plaintiff had built a dam and laid pipes upon the lands of the defendant.

It is submitted that these authorities have no application whatever to the present case, because, in the case at bar, it is not shown that the plaintiffs claim any right to enter upon the lands of the defendant or that they have made any improvements whatever upon the defendant's lands or that any license so to do was ever given

THE COMPLAINT IS INDEFINITE AND UNCERTAIN.

It is a distinct ground of the special demurrer that the complaint is indefinite and uncertain, as to the time when the alleged agreement between Joe Garavanta and the defendant was made. (Transcript p. 11.) This is a personal action for the recovery of damages.

"In personal actions the pleading must allege

the time, that is, the day, month, and year when each traversable fact occurred."

Andrews' Stephens Pleading, Sec. 194.

Ames v. Nostrum, 125 Pac. 120.

Andrews v. Taylor, 40 Conn. 157.

IN ACTIONS AT LAW EQUITABLE RIGHTS CANNOT BE CONSIDERED.

In this action at law, the legal rights of the parties prevail. The plaintiffs seeming excuse for bringing this action is that they were compelled to sue at law because at law they have a complete remedy. (Plaintiffs' Brief pp. 4-5.) The defendant's objection is, not that the plaintiffs have sued at law, but that they are attempting to maintain an action at law upon purely equitable grounds. This is one of the grounds of defendant's demurrer. (Transcript p. 12.)

In this court and in this action, equitable considerations are not available.

"Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the issues of fact by a jury. In the federal courts an action at law cannot be maintained in equity, **nor is an equitable cause of action or an equitable defense available at law.**"

Highland Boy G. M. Co. v. Strickley, 116 Fed. 852, 853-4.

Courtney v. Pradt, 160 Fed. 561-2.

McKemy v. Supreme Lodge, A. O. U. W. 180
Fed. 961.

“At law a license could not have the effect to create an interest in lands upon the theory of becoming irrevocable by estoppel, as courts of law deal with the legal aspect of estates in lands, and cannot enforce equities which grow out of an equitable estoppel against the owner of land.”

Curtis v. La Grande W. Co. (Ore.) 23 Pac.
809-810.

Wheaton v. Cutler (Vt.), 79 Atl. 1901-1905.

Baynard v. Every Evening Printing Co.
(Del.) 77 Atl. 885.

St. Louis National Stock Yards v. Wiggins
Ferry Co. 102 Ill. 514.

The plaintiffs plead an invalid oral agreement. They seek to recover damages, not because the agreement is enforceable, but for the reason, as they claim, that under that agreement they have made expenditures and improvements under such circumstances that it is inequitable and unjust that the defendant should not perform the alleged agreement. The moment that they allege that they are entitled to recover in this action, not because of any legal right, but because of alleged equitable considerations, that moment they state themselves out of court. We have heretofore shown that the facts pleaded constitute no ground for relief in equity, and the plaintiffs' complaint not stating either a cause of action at law or in equity, surely the judgment should be affirmed.

It is respectfully submitted that the defendant's demurrer to the plaintiffs' third amended complaint is well taken upon each of the grounds herein stated, and that the judgment of the court sustaining said demurrer should be affirmed.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendant.

NO. 2587

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE BRIGHT, et al.,
Plaintiff in Error.

vs.

VIRGINIA AND GOLD HILL WATER
COMPANY (a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

SWEENEY & MOREHOUSE,

Counsel and Attorneys for Plaintiff in Error.

Filed this _____ day of _____, 1916.

FRANK D. MONCKTON, Clerk.

By _____ Deputy Clerk.

Filed

1916

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REPLY BRIEF FOR PLAINTIFF IN ERROR

This is an action at law for damages, and not a suit in equity. In the Federal Court, the rule is, if a party has a plain, speedy and adequate remedy at law, equity jurisdiction will not lie,

Sec. 723 R. S. Stat. U. S.

And where the suit is one for the recovery of a money judgment the action is one at law.

Whitehead vs. Shattuck, 138 U. S. 151.

Northern Pacific vs. Amacker, 49 Fed. 537.

Parkersburg vs. Brown, 106 U. S. 500.

Ambler vs. Chateau, 107 U. S. 586.

Borzard vs. Houttan, 119 U. S. 352.

Wagner vs. Drake, 31 Fed. 849.
 Hemsley vs. Meyers, 45 Fed. 287.
 Willis vs. Knapp, 39 Fed. 592.
 Frey vs. Willoughky, 63 Fed. 865.
 Scott vs. Neeley, 140 U. S. 106.

The action is therefore one at law, and if not, then no demurrer would lie, because, by the new rules in equity (Rule 29 P. 889, Montgomery's Manual), adopted by Supreme Court U. S. February 1st, 1913.

II

But is it claimed, that the action is within the Statute of Frauds, because relating to an interest in land. But the complaint nowhere claims that Plaintiff or her predecessors sold or assigned or transferred or agreed to transfer any interest in land, or that Defendant sold, assigned or transferred any interest in land, so that an interest in land does not anywhere appear in the complaint, and upon this point, the complaint comes within the following cases:

Bates vs. Babcock, 95 Calif. 479.
 Sec. 1258 Elliott on Contracts, Vol. 2.
 Sec. 1261 Elliott on Contracts, Vol. 2.
 Croke vs. Am. Nat. Bank, 40 Pac. 229.
 De Graffedreid vs. Savage, 47 Pac. 902.
 Tyson vs. Despain, 43 Pac. 1039.

III

But it is claimed the contract could not be performed, within one year. **Why?** All that had to

be done, was to furnish the water, and the Plaintiff to use the same for irrigation. This could be done, and was done, within one year. The fact that this was to go on indefinitely does not bring the case within the Statute of Frauds.

Sec. 1277 Elliott on Contracts, Vol. 2.
 Nestor vs. Diamond, etc., 143 Fed. 72.
 Wehner vs. Bauer, 160 Fed. 240.
 Jones vs. Patrick, 140 Fed. 403.

But even if the oral contract was originally within the Statute of Frauds, the Defendants cannot now complain, because the contract has long since ceased to be executory, and has for forty years been acted upon and executed, and the rights of the parties have become fixed, and neither can raise the issue of the Statute of Frauds.

Brown, Statute of Frauds, Section 116, says:

“When the contract has been in fact, completely executed on both sides, the rights, duties and obligations of the parties, resulting from such performance stand unaffected by the Statute.”

In *Cartin vs. David*, 18 Nevada, 310, Judge Hawley says, “Moreover, the contract in this case was fully executed on both sides. The rights of the parties became fixed, and neither party can interfere with them by **pleading** the Statute of Frauds, (p. 330).”

So in *Smith vs. Green*, 41 Pac. 1022, the Supreme Court of California says: “The general rule, no doubt is, that one who rests his claim to an ease-

ment on a verbal contract done, **unexecuted** and **unaccompanied** by any other facts, has no rights thereto, which he can enforce. But there are many cases where a parol license which has been **executed**, and when investments have **been made** upon the faith of it, has been held irrevocable (Gould vs. Waters 323, 324 and cases there cited); and if the case at bar is to be determined alone upon the law governing parol grants, the rights of respondents, under the facts found, would be established by law." This case will be found as to facts exactly in point.

So in *McLure vs. Koen*, 53 Pacific, 1058, it is said: "Bar of Statute cannot avail against oral contract relating to reality, consideration having passed, the contract having been performed by both parties, and possession taken in pursuance thereto."

It will be seen from the complaint, that the oral contract, between the parties hereto, has been carried out and performed for at least forty years. Therefore no question can be raised by demurrer or answer of the Statute of Frauds.

The Company contracted to furnish the water (p. 5 Trans.) for Plaintiff's land and premises, and the same were furnished for more than forty years (Trans. p. 7), and the Plaintiff, and her predecessors in interest, expended large sums of money in pursuance of said contract and upon the faith thereof and particularly in the year 1913 (Trans. pp. 7 and 8) when said waters were being used by Plaintiffs and the said waters were flowing as always (Trans. p. 8) and there was plenty of water for the purposes of said contract (Trans. p. 8) and no loss or reduction of the quantity of water. When Defendants cut off, diverted and stopped the over-

flow of said waters and deprived the Plaintiffs from the use thereof. If this does not constitute a cause of action for damages, for the breach of the contract, then we can not and do not understand the law of contracts or damages. But the Court says (Trans. p. 18), "In other words, the Defendant failed to divert enough water from Marlette Lake to create an overflow and waste which would run down to Plaintiff's premises." How the Court can so find, we do not know, when the complaint clearly shows (Trans. p. 8) that there was plenty of water and no loss or reduction thereof, and the same was being used at that time. It had contracted that such "overflow" should be permitted, **continuously**, and without interference (Trans. p. 5). It had then contracted to keep up and permit such overflow, and the ruling of the Court upon demurrer is not in accordance with the facts set out in the complaint and the conclusion drawn by the Court cannot be sustained.

The other questions raised by the demurrer are not tenable and were not passed upon by the Court. That the oral contract has been fully performed, that large sums of money have been expended upon the faith thereof, makes the contract valid and binding and irrevocable, and Plaintiffs can sue for damages at law.

Garrett vs. Bishop, 41 Pac. 10.

Huff vs. McCauley, 91 American Dec. 203.

Flickenger vs. Shaw, 87 Cal. 126.

Gramshaw vs. Belcher, 88 Cal. 217.

De Graffenried vs. Savage, 47 Pac. 902.

It will be seen from the last above cited case, it matters not whether the issue here be an easement or a license, in any case, after the same become **executed**, it could not be revoked and if revocable the Defendant would be liable in damages, as shown by the authorities in our opening brief.

Now a license "Is a permission to do a certain act, or a series of acts upon another's land without acquiring an estate therein."

Section 981 Kinney on Irrigation, 2nd Edition.

"It may be given in writing or verbally, notwithstanding the Statute of Frauds."

Section 981 Kinney on Irrigation, 2nd Edition.

"If the licensee, under the authority of a parol license, for a consideration, makes large investments for the enjoying of the privilege, the licensor is held estopped from making a revocation."

Section 981 Kinney on Irrigation, 2nd Edition.

IV

We are making no claim of prescription or appropriation. We are relying upon our contract, and therefore appropriation or prescription cannot apply. They agreed to furnish the water. The contract was valid. They furnished the water forty years. It was running. The supply sufficient. They had the supply. It was their duty to furnish the water according to the contract. Without notice, without cause, the supply was cut off, to Plaintiffs' damages in the sum of \$14,823.00. What excuse was there? None. Why this complaint fails to state a

cause of action we cannot see. A demurrer admits the facts pleaded. If there are any other facts, they must be set up by answer.

Respectfully submitted,

Sweeney & Morthouse
Attorneys for Appellants.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CLAYTON T. EAID and JOSEPH A. McCONNELL,
Appellants,

vs.

TWOHY BROS. COMPANY, a corporation, THE
NORTHWESTERN EQUIPMENT COMPANY,
a corporation, and ELBERT G. CHANDLER,
Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the District Court of the
United States for the District of Oregon.

Filed

MAR 29 1915

F. D. Munckton,

Clerk

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*In the United States Court of Appeals for the Ninth
Circuit.*

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Citation on Appeal

United States of America,
District of Oregon,—ss.

To Twohy Bros, Company, The Northwestern Equipment Company and Elbert G. Chandler,
Greeting:

Whereas, Clayton T. Eaid and Jos. A. McConnell, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 27 day of October in the year of our Lord, one thousand, nine hundred and fourteen.

R. S. BEAN,

Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the copy of the within, admitted
at Portland, this 28th day of October, 1914.

W. R. LITZENBERG,
Atty. for Defts.

Filed October 28, 1914. G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

November Term 1913.

Be it remembered, that on the 15th day of December, 1913, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

Bill of Complaint.

*In the District Court of the United States for the
District of Oregon.*

CLAYTON T. EAID, and JOS. A. McCONNELL,
Plaintiffs,

vs

TWOHOY BROS. CO., a corporation, JOHN
TWOHOY, THE NORTHWEST EQUIPMENT
CO., a corporation, and ELBERT G. CHAND-
LER,

Defendants.

To the Judges of the District Court of the United States for the District of Oregon:

Clayton T. Eaid, of Portland, Oregon and Jos. A. McConnell, of Dallas, Oregon, each residents and citizens of the State of Oregon, bring this their Bill against Twohy Bros. Co., a corporation organized under the laws of the State of Oregon, and John Twohy, of Portland, Oregon, Northwest Equipment Co., a corporation and E. G. Chandler, each residents and citizens of the State of Oregon, and inhabitants of the District of Oregon, and for cause of suit plaintiffs allege as follows:

I.

That heretofore, on the 24th day of January, 1908, plaintiff Jos. A. McConnell was the true, original and first inventor of a certain new and useful chock attachment for cars not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application for patent therefor hereinafter recited, and not in public use or on sale in this country for more than two years prior to his application for patent therefor hereinafter recited; and that no application for a foreign patent for said invention was filed more than twelve months prior to the filing of the application for the hereinafter recited patent in this country.

II.

That the said Jos. A. McConnell being as aforesaid the inventor of said improvement and being a citizen of the United States, made application to the proper department of the Government of the United States, to-wit, the Commissioner of Patents, for letters patent in accordance with the then existing acts of congress, and having complied in all respects with the conditions and requirements of said acts on the 20th day of October, 1908, letters patent of the United States no. 901815, signed, sealed and executed in due form of law for said invention or discovery were issued and delivered to the said Jos. A. McConnell, whereby there was secured to him and to his heirs, legal representatives and assigns for the term of seventeen years from the 20th day of October, 1908, the full and exclusive right of making, using and vending said improvement to others to be used, which said letters patent are now of record in the patent office of the United States, and a certified copy of which is ready here in court to be produced.

III.

That a description or specification of the aforesaid improvement was given in the schedule to the aforesaid letters patent, accompanied by said drawings referred to in such schedule and forming a part of said letters patent. The said letters patent and the said specifications thereto annexed which, or an exemplified copy of which plaintiff will produce as

directed by this court, were duly recorded in the patent office.

IV.

That by an instrument in writing bearing date June 28, 1913, the said Jos. A. McConnell duly assigned, transferred and set over unto the plaintiff, Clayton T. Eaid, a one fourth interest in and to the said invention and letters patent for, to and in the entire United States and all of its states and territories, to be held and enjoyed by him for the life of said patent, which assignment was duly recorded on November 17, 1913, in the patent office of the United States in Liber Z93, page 79 of Transfers of Patents as by said assignment with the certificate of recording thereto affixed or a duly certified copy of said assignment in court to be produced will more fully appear, and the plaintiffs are now the exclusive owners of said letters patent and of the invention and improvement therein described, and claim and own all rights secured by said letters patent since the date thereof, and are entitled to be protected in the enjoyment of the same.

V.

Yet the said defendants, well knowing the premises and the rights secured to your orators, as aforesaid, but contriving to injure your orators, and to deprive them of the benefits and advantages which might and otherwise would accrue unto them from said invention after the issuing of the letters patent

and after the vesting of the same in your orators, as aforesaid, and before the commencement of this suit, did as your orators are informed and believe, without the license or allowance and against the will of your orators, and in violation of their rights and in infringement of the aforesaid letters patent within the District of Oregon and elsewhere in the United States unlawfully and wrongfully, and in defiance of the rights of your orators, make, construct, use, and vend to others to be used, chock attachments for cars made according to and employing and containing said invention and that they still continue so to do; and that they are threatening to make the aforesaid chock attachments for cars in large quantities and to supply the market therewith and to sell the same.

All in defiance of the rights acquired by and secured to your orators, as aforesaid, and to their great and irreparable loss and injury, and by which they have been and still are being deprived of great gain and profits which they might and otherwise would have obtained, and which have been received and enjoyed, by the said defendants by and through their aforesaid unlawful acts and doings.

VI.

And your orators further show unto Your Honors, on information and belief, that said defendants have sold large quantities of said chock attachments for cars, and still have a large quantity on hand which

they are still offering for sale, and have made and realized large profits and advantages therefrom; but to what extent and how much exactly your orators do not know, and pray a discovery thereof. And your orators say that the use of said invention by said defendants and their preparation for and avowed determination to continue the same, and their other unlawful acts as aforesaid, in disregard and defiance of the rights of your orators, have the effect to and do encourage and induce others to venture to infringe said patent in disregard of your orators' rights.

And your orators further show unto your Honors that they have caused notice to be given to said defendants of said infringements and of the rights of your orators in the premises, and requested them to desist and refrain therefrom; but they, the defendants, have disregarded said notice and refused to desist from said infringements, and still continue to make, use and sell said chock attachment for cars.

And forasmuch as your orators have no adequate relief except in this court, to the end that the defendants may be compelled to account for and to pay over the income thus unlawfully derived from the violation of the rights of your orators as above, and be restrained from any further violation of said rights, your orators pray that Your Honors may grant a writ of injunction, restraining the defendants and each of them from any further construction, or sale or use in any manner of said patented invention or any part thereof, in violation of the rights of your orators as afore-

said, and that the chock attachment for cars now in the use of the said defendants may be destroyed, or delivered up to your orators for that purpose. And also, that Your Honors, upon the entering of a decree for infringement, as above prayed for, may proceed to assess, or cause to be assessed under your direction, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orators have sustained by reason of such infringement, and that your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the wilful and unjust infringement by the said defendants as herein set forth.

And your orators also pray for a provisional or preliminary injunction, and for such other relief as the equity of the case may require, and as to your honors may seem meet.

CLAYTON T. EAID &
JOS. A. McCONNELL

Complainants.

STAPLETON & SLEIGHT

Solicitors for Complainants

JOS. L. ATKINS

Of Counsel.

United States of America,
State of Oregon,
County of Multnomah,—ss.

On the 15th day of December, 1913, at Portland, in the County and State aforesaid, before me

personally appeared Clayton T. Eaid, and solemnly affirmed that he has read the foregoing Bill and knows the contents thereof, and verifies this complaint for himself and his co-plaintiff, and that he knows that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true, and thereupon subscribed the same.

[seal]

H. B. EDWARDS

Notary public within and for the
County of Multnomah, State
of Oregon.

Filed December 15, 1913. A. M. Cannon, Clerk.

And afterwards, to wit, on the 9th day of January; 1914, there was duly filed in said Court, and Cause an Answer, in words and figures as follows, to wit:

Answer.

Come now the defendants above named and for answer to the plaintiffs' Bill of Complaint, admit, deny and allege as follows,—

I.

In answer to paragraph I of the Bill of Complaint, these defendants allege that they have no knowledge of information sufficient to form a be-

lief as to whether any of the allegations therein contained are true, and therefore they deny the same and each and every of the allegations thereof.

II.

In answer to paragraph II of the Bill of Complaint, these defendants allege that they have no knowledge or information sufficient to form a belief as to whether any of the allegations therein contained are true, and therefore they deny the same and each and every of the allegations thereof, except that these defendants admit that on the 20th day of October, 1908, letters patent of the United States, No. 901,815, were issued to Joseph A. McConnell.

III.

In answer to paragraph III of the Bill of Complaint, these defendants allege that they have no knowledge or information sufficient to form a belief as to whether the allegations therein contained are true, and therefore they deny each of them.

IV.

In answer to paragraph IV of the Bill of Complaint, these defendants allege that they have no knowledge or information sufficient to form a belief as to whether any of the allegations therein contained are true, and therefore they deny the same and each and every of the allegations thereof.

V.

In answer to paragraph V of the Bill of Complaint, these defendants deny that they, or that any of them, have in any manner whatsoever contrived, or that they are contriving, to injure plaintiffs, or to deprive them of any benefits and advantages whatsoever, or which may be secured to them by the letters patent referred to, and deny that they have in any manner infringed said letters patent referred to, in the district of Oregon, or elsewhere in the United States; and deny that they have unlawfully or wrongfully, or in defiance of any rights of plaintiffs, made, constructed, used or sold to others to be used, any chock attachments for cars, made according to and employing and containing said alleged invention, and deny that they still continue so to do, or that they are threatening to make any chock attachments for cars, in large quantities, or in any quantity whatsoever, which in any manner infringe upon said alleged letters patent.

And defendants deny that, in defiance of any rights secured to plaintiffs, they have deprived, or that they are depriving plaintiffs of great gain and profits, or of any gain or profit, which they might and otherwise would have obtained; and defendants deny that they have received and enjoyed, or that they are receiving and enjoying, any gains or profits by and through any unlawful acts and doings.

VI.

In answer to paragraph VI of said Bill of Complaint, defendants deny that they have sold large quantities, or any quantity whatsoever, of any chock attachments for cars which infringe the letters patent referred to, and deny that they have on hand, or that they are offering for sale any such chock attachments; deny that they have realized large profits and advantages from the sale of any chock attachments which infringe said letters patent; deny that they are using, or that they have made or are making any preparation to use, any invention which in any way infringes the letters patent referred to by plaintiffs, and deny that they are guilty of any unlawful acts as alleged in said Bill of Complaint, in disregard and defiance of any rights secured to said plaintiffs, or which can have the effect of encouraging and inducing others to venture to infringe said letters patent referred to.

Defendants deny that plaintiffs, or either of them have caused notice to be given to said defendants, or to any of them, of any alleged infringement, and deny that plaintiffs requested them to desist and refrain from any alleged infringement; deny that they have received any notice or refused to desist from any alleged infringement; and deny that they continue to make, use and sell any chock attachment for cars which can be construed to infringe the letters patent referred to by plaintiffs.

For further answer, and affirmative defence to the Bill of Complaint, defendants allege,—

VII.

That upon an application for letters patent, duly and regularly made and filed by the defendant, Elbert G. Chandler, in the United States Patent Office, under date March 7, 1913, and the payment of the fees required by law, Letters Patent No. 1,066,795, in due and regular form, were issued, under date July 8, 1913, to said Elbert G. Chandler, for improvements in Log Bunks; that the same are now in his possession and ready to be produced when required, securing to defendant Chandler and to his licensees for the full term of seventeen years from the date thereof, the full and exclusive right to make, use and sell the improvements in Log Bunks therein described, illustrated and claimed; that the Log Bunks made and sold by these defendants, or by any of them, have been made and are being made under the authority of the rights secured by said letters patent and according to the specifications fully set forth therein; that said Log Bunk, as fully illustrated, described and claimed in said letters patent, and as made by these defendants, does not infringe the alleged letters patent referred to and claimed to be owned by the plaintiffs herein; that these defendants have acted in the utmost good faith, protected by the laws of the United States, and have acted under the authority thereof, and without violation of the rights of the plaintiffs, or of any persons whomsoever.

Wherefore, these defendants, for the reasons hereinabove recited respectfully submits that they ought not to be decreed to account to the complainants for, or to pay anything to them in the nature of profits or damages, or be enjoined or restrained as in the said bill of complaint prayed.

These defendants submit to this Honorable Court that said complainants have the right to no other or further answer to said Bill of Complaint than is herein contained and have no right to an injunction, decree or other relief prayed for in said Bill of Complaint;

All of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court may direct and it humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

TWOHY BROS. CO.

JOHN TWOHY,

THE NORTHWESTERN EQUIPMENT CO.

ELBERT G. CHANDLER,

Defendants,

By

(Sgd) ELBERT G. CHANDLER

One of Defendants.

W. R. LITZENBERG

Solicitor for Defendants.

State of Oregon,

County of Multnomah.—ss.

On this 8th day of January, 1914, in the City of Portland, County of Multnomah, and State of Ore-

gon, before me, a Notary Public in and for said State and County, personally appeared Elbert G. Chandler, and solemnly affirmed that he has read the foregoing answer and knows the contents thereof, and verifies this answer for himself and for his co-defendants, and says that he knows that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

(Seal)

R. B. FRENCH

Notary Public within and for the
State of Oregon,
County of Multnomah.

District of Oregon,
County of Multnomah.—ss.

Due service of the within answer is hereby accepted in Portland, Multnomah County, Oregon, this 8th day of January, 1914, by receiving a copy thereof, duly certified to as such by W. R. Litzenberg, Attorney for Defendants.

R. SLEIGHT

of Attorneys for Plaintiffs.

Filed January 9, 1914. A. M. Cannon, Clerk.

And afterwards, to wit, on the 10th day of August, 1914, there was duly Filed in said Court, and cause an OPINION, in words and figures as follows, to wit:

Opinion.

Stapleton & Sleight and Joseph Atkins for Plaintiffs, William R. Litzenberg for Defendants.

Wolverton, District Judge:

The complainants are the owners of certain letters patent for a log bunk, No. 901,815, issued October 20, 1908, and allege infringement by the defendants, who are manufacturing a log bunk under and in pursuance of letters patent issued to Elbert G. Chandler July 8, 1913, being No 1,066,795. The former will be referred to as the McConnell and the latter as the Chandler patent.

The McConnell patent consists of two parallel beams which are disposed crosswise of a car, and are detachably affixed thereto. Between and on the outer side of these beams are arranged rods so disposed as to operate a chock upon the opposite side of the car, so that when the car is loaded with logs the chock may be lowered, and thus release the logs, by which they are dumped from the car. Between the beams, and secured to the opposing faces thereof, are combined guiding and stop devices, each of which consists of a face-plate having an integral longitudinally extending ratchet-bar, and also a longitudinally channeled guide formed integral with the face-plate, located above but beyond the ratchet-

bar. Interposed between the stop devices of each pair is a chock consisting of a bowed or curved arm, having trunnions, designed to travel with the guides. Those portions of the trunnions outside of the guides and above the ratchet-bars are provided with cam faces, terminating in shoulders, so designed that when the chock is swung upward they turn downward into engagement with the adjoining teeth of the ratchet-bar. An arm extends downward from each of the chocks, and pivotally connecting with it is a rod called a link, having a series of apertures, any one of which is designed to receive a wrist or pin on the extended chock. The link is connected to a crank-arm located in the center of the car, extending from a cross-shaft. From the other side of the car is another rod, which is connected with the shaft by another crank-arm, and through the co-operation of these two rods the chock is operated in releasing it for dumping the logs. The crank-arms are so arranged or disposed that when the chock is set between the ratchet-teeth, in a position for holding the logs, the chock cannot be lowered, when the pressure of the logs is against it, except by pulling the co-operating rods outwardly. The chocks are slidable in the channeled guides, and when lowered may be adjusted to suit the size of the logs being loaded, but not when elevated or locked. The operation for unloading is by a handle on the outer and opposite end of the rods.

The Chandler patent has side-beams, as in the McConnell, secured to the inside of the beams at

each end of the bunk, and opposite each other are bracket-members, having corrugated or notched upper edges. Beneath the bracket-member on one side is hinged a swinging plate, and on the other side a flange-like portion. A chock is provided having trunnions, movably and changeably mounted in the notches of the bracket members, the upper end of the chock being adapted to project above the top of the beams or supporting surface of the bunk, and the lower end being provided with a lip or flange portion, there being a chock at each end of the bunk. The opposite side of the lower extension of the chock has a cleat which co-operates with the flange portion of the opposite bracket above described. The operation of the chock to hold it in position for receiving the load is effected by means of a rod extending from one end of the bunk to the other underneath the swinging plate, the rod having off-set portions, so adjusted with reference to the swinging plate as that when the rod is turned in one direction, it raises the swinging plate so that the lip on the lower extension of the chock comes into engagement with it, and the chock is held in place against pressure from the load. The rod is provided with a handle for its adjustment, and, when revolved in the opposite direction, the swinging member is allowed to drop down, and the chock, being released, falls back, and the load is liberated. The chock can be moved outwardly or inwardly, whether the rod and swinging member are in position for holding the chock in place for receiving the load or not.

The only question in the case is whether use under the Chandler patent is an infringement of the McConnell patent.

The issuance by the patent office of a more recent patent engenders a presumption *prima facie* that there is a patentable distinction or difference between the later and the earlier devices. The presumption, however, is not conclusive, as the question is still open for judicial inquiry. *Electric Candy Machine Co. v. Morris*, 156 Fed. 972, 975.

Claim one in the McConnell patent includes fixed means for engaging the chocks when elevated only, to hold them against sliding movement in one direction, and means carried by the beams for actuating the chocks. Claim ten includes stop devices for engagement with the chock when in one position, and means for lowering the chock, to disengage it from said devices, and for sliding the chock while in a lowered position. The fixed means for engaging the chock are the ratchet-teeth, and the engagement is effected when the chock is elevated only. This holds the chock against sliding movement in one direction. The means carried by the beams for actuating the chock are the rods and their mechanism, with the cross-shafts and crank-arms. In claim ten, the stop devices for engagement with the chock when in one position are again the ratchet-teeth. This is the same element as in claim one, except that the words "when elevated only" are omitted. The means for lowering the chock to disengage it from

said devices are also the means carried by the beams for actuating the chocks; the same element as in claim one. The means for sliding the chock are the guides, which direct the movement of the chock. The chock may be slid in either direction to suit the size of the load to be carried, but this only when the chock is lowered, and positively not when in an elevated position. For in the latter position the cam prevents movement in one direction, and, in practical operation, in either direction.

It is claimed that the plaintiffs' bunk is a primary invention in the art, and that plaintiffs are entitled to a wide range of equivalents as it pertains to the means for actuating and lowering the chock, and that the means employed by the Chandler patent for engaging and disengaging the chock are mere mechanical equivalents of the means employed in plaintiffs' device. The means employed by the latter, it must be conceded, are very different from those of the former. In the Chandler patent we find the rod, with set-off as, and by partial revolution the set-offs engage the swinging member, and raise the latter so that when the chock is in an elevated position the lip of its lower extension engages the swinging member, and locks the chock as pressure is brought against it. This is obviously different from the mechanism that engages and disengages the chock in the McConnell device, which is effectuated by rods, with their mechanism, that are pushed and pulled endwise, and cooperate with the chock in a different way. I am inclined to think that the means so employed in the

Chandler device are not mechanical equivalents of those in the McConnell.

But this is not all. The Chandler device is a marked advance upon the McConnell device. The ratchet and the stop devices accompanying the McConnell patent are wanting in the Chandler. If it be said that the bracket-seats in the Chandler device are stop devices, then the chock is always in engagement with them, and not when in an elevated position only. The chock can be adjusted at all times by moving it forward or back, whether in an elevated position or not, and whether the means for engaging the chock are set or not. The movement consists in raising the chock from the bracket-seats in which it rests and dropping it into others, and cannot be appropriately termed a sliding movement.

I have not alluded to claims other than the first and tenth in the McConnell patent, because the others are all narrower than these two.

Upon the whole, I am impressed that the devices for engagement with the chock, the mechanism for the convenient adjustment of the chock, and the means for engaging and disengaging are not mechanical equivalents in the one patent as compared with the other. Two devices that do the same work in substantially the same way, and accomplish substantially the same result, are mechanical equivalents, though they may differ in name, form, or shape. *Machine Co. v. Murphy*, 97 U. S. 120, 125.

But it cannot be said of the Chandler device that it does the work in substantially the same way, although accomplishing a result which is the same in either case. Such being the case, there is no infringement of the McConnell patent by use of the Chandler patent.

And afterwards, to wit, on Wednesday, the 12th day of August, 1914, the same being the 33rd Judicial day of the Regular July, Term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Final Decree.

This cause having been brought on to be heard at this term, and upon the pleadings and proofs on file herein, and having been argued by Joseph Atkins for Plaintiffs, and William R. Litzenberg for Defendants, respectively, and upon consideration thereof, it is ordered, adjudged and decreed:

That there is no infringement of the McConnell patent by the defendants in making the Chandler bunk, and the Bill of Complaint is hereby dismissed.

That the defendants recover their costs in this suit.

CHARLES E. WOLVERTON

Judge.

Signed this 12th day of August, 1914, at Portland, Oregon.

And afterwards, to wit, on the 27th day of October, 1914, there was duly Filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

Petition for Appeal.

To the Honorable Robert S. Bean, District Judge:

The above named plaintiffs, Clayton T. Eaid and Joseph A. McConnell, conceiving themselves aggrieved by the decree entered herein August 12, 1914, by which it was decreed that the defendants herein had not infringed the patent under which the plaintiffs claim, and that the plaintiffs were not entitled to the relief demanded in the complaint, and that the defendants recover from the plaintiffs their costs and disbursements, do hereby appeal from said decree, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors herewith filed, and pray that the appeal may be allowed and that a transcript of the record, proceedings and papers on which said decree was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that pending the determination of said appeal said decree be suspended as to the payment of costs by plaintiffs upon their giving a bond in such sum as shall be fixed by the court.

Dated Oct. 26th 1914.

STAPLETON & SLEIGHT &

JOS. L. ATKINS,

Attys. for Plaintiffs.

Filed October 27, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October, 1914, there was duly filed in said Court and Cause, an Assignment of Errors, in words and figures as follows, to wit:

Assignment of Errors.

The above named plaintiffs assign the following errors upon the decree herein which was entered August 12, 1914.

I

In decreeing that the plaintiffs are not entitled to the relief prayed for in the complaint.

II

In decreeing that the McConnell patent set forth in the complaint and therein sued upon is not infringed by the structures and log bunks manufactured by the defendants.

III

In decreeing that the plaintiffs were not entitled to an injunction restraining defendant from continuing to manufacture or sell said structures and log bunks manufactured by them under the Chandler patent.

IV

In decreeing that the subject matter of the Chandler patent is substantially different from that defined in the claims of the McConnell patent, severally.

V

In decreeing that the Chandler device is a marked advance upon the McConnell device.

VI

In failure to recognize the prior state of the art upon which the McConnell patent is predicated.

VII

In failure to ascribe to the McConnell patent its proper relationship to the prior art.

VIII

In failure to allow to the McConnell patent the full benefit and scope of the language of the claims, in construing the same.

IX

In denying to the McConnell patent that liberal interpretation to which it is entitled under the law.

X

In failure to extend the application of the doctrine of equivalents to the claims of the McConnell patent, *seriatim*, in determining their scope.

XI

In reading into claim 1, line 6 of the McConnell patent a comma after the word "only" where none appears in the patent.

XII

In limiting the construction of claim 1 of the McConnell patent upon the interpolation of a comma after the word "only" in line 6 thereof.

STAPLETON & SLEIGHT &
JOS. L. ATKINS,

Attys. for plaintiffs.

Filed October 27, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 27th day of October, 1914, the same being the 98th Judicial day of the regular July, term of said Court; Present: the Honorable ROBERT S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Order Allowing Appeal.

Upon reading and filing the petition of the above named plaintiff, for an order allowing an appeal from the decree entered August 12, 1914, and upon the assignment of errors filed by said plaintiffs, and upon motion of Stapleton & Sleight, of counsel for plaintiffs

IT IS ORDERED that the appeal of said plaintiffs to the United States Circuit Court of Appeals for the Ninth Circuit from said decree be and the same is hereby allowed, and a transcript of the record

be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that the amount of the bond upon appeal to be given by plaintiffs is hereby fixed at the sum of five hundred dollars.

Dated Oct. 27th, 1914.

R. S. BEAN,
Judge:

Filed October 27, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October, 1914, there was duly filed in said Court and cause, a Bond on Appeal, in words and figures as follows, to wit:

Bond on Appeal.

Know All Men By These Presents that we, Clayton T. Eaide and Joseph A. McConnell as principals and Geo. F. McClintock as surety are held and firmly bound to the Twohy Brothers Company a corporation, the Northwestern Equipment Company, a corporation and Elbert G. Chandler, defendants, in the full and just sum of five hundred dollars to be paid to the defendants aforesaid, for which payment well and truly to be made we bind ourselves, our successors, heirs, executors, administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26 day of Oct., 1914.

Whereas the District Court of the United States for the District of Oregon in the cause above entitled did make and enter a decree on August 12, 1914, in favor of the defendants and against the plaintiffs adjudging that the plaintiffs were not entitled to the relief prayed for in the complaint, and that the defendants have not infringed the McConnell patent under which the plaintiffs claim, and that the defendants were entitled to recover costs from the plaintiffs, and these defendants having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the aforesaid suit, and a citation directed to the said defendants is about to be issued citing them to appear in the said Circuit Court of Appeals to be held at San Francisco, California, and an order having been made and entered that these defendants should give a bond upon said appeal in the sum of five hundred dollars with surety to be approved by the Judge of this court,

NOW THEREFORE the condition is such that if the said plaintiffs, Clayton T. Eaid and Joseph A. McConnell shall prosecute their said appeal to effect and shall pay all damages and costs that may be awarded against them if they fail to make their plea good, then this obligation to be void; otherwise to remain in full force and virtue.

CLAYTON T. EAID
JOSEPH A. McCONNELL
GEO. F. McCLINTOCK

State of Oregon,
Multnomah County,—ss.

I, Geo. F. McClintock, being duly sworn say that I am a resident and free holder within the State of Oregon, and am not a counsellor or attorney at law, sheriff, clerk or other officer of any court, and am worth the sum of one thousand dollard over and above all debts and liabilities, and exclusive of property exempt from execution.

GEO. F. McCLINTOCK

Subscribed and sworn to before me this 26 day of Oct., 1914.

[Notarial Seal]

R. SLEIGHT
Notary Public for Oregon.

The sufficiency of the foregoing bond and surety is hereby approved this 27th day of Oct., 1914.

R. S. BEAN,
Judge.

Filed October 27, 1914. G. H. Marsh, Clerk.

(Testimony of Joseph A. McConnell.)

And afterwards, to wit, on the 5th day of January, 1915, there was duly filed in said Court, and cause, an Abstract of the Evidence, in words and figures as follows, to wit:

Evidence.

Appearances:

Stapleton & Sleight, and Jos. L. Atkins, for plaintiffs. Wm. R. Litzenberg, for defendants.

Plaintiffs' counsel offered in evidence a certified copy of the patent to J. A. McConnell no. 901815 granted Oct. 20, 1908, for improvement in chock attachment for cars. Same was marked plaintiffs' exhibit A and received in evidence.

It was then stipulated between counsel that copies of exhibits might be substituted for all authenticated originals not waiving the requirment of proof of originals.

JOS. A. McCONNELL, one of plaintiffs, called as a witness for plaintiffs testified as follows:

DIRECT EXAMINATION.

I am the patentee named in plaintiffs' exhibit A. The paper you now show me is an assignment of that patent and is signed by me; it assigns a partial interest to Clayton T. Eaid and was recorded in the patent office in Liber Z 93 page 79 on Nov. 17, 1912.

(Testimony of Clayton T. Eaid.)

Copy of such assignment offered in evidence in pursuance of the above stipulation and same marked plaintiffs' exhibit B and received in evidence.

CROSS EXAMINATION.

I first met Mr. Eaid about a year ago I think—I don't remember exactly. The assignment was executed afterwards—probably in the course of a month or such a matter. I never had any other dealings with him, other than the negotiating of this assignment.

Excused.

CLAYTON T. E Aid, one of plaintiffs, called as a witness for plaintiffs, testified as follows:

DIRECT EXAMINATION.

My name is C. T. Eaid; I live at 1087 Merges Drive in Portland; I am about 36 years of age. I handle timber land and real estate and at present am engaged in the car-bunk business. I have been engaged in the car bunk business for about five years. During that time I have invented six different contrivances, of different natures, for the purpose of holding the logs on the car. I have tried to complete the art, in fact, so as to get something to successfully operate in that direction, to have something that would be useful for the loggers.

By a car bunk I mean a device that goes onto the platform of the car, which the logs are loaded onto,

(Testimony of Clayton T. Eaid.)

to hold the logs sufficiently to be carried from the woods operation to the landing at the mills where they are unloaded, to save accidents, and so that they can be manipulated from the other side of the car, to keep people from getting killed when the logs are rolled off when they are unloaded. It has been my business to develop devices for that purpose.

I am one of the complainants in this suit. I have had business dealings with the defendants prior to the commencement of this suit. I met the Twohy Bros. Company about two years ago, I think in May, made a preliminary contract with them for the manufacturing of a logging bunk which I had invented.

The COURT: Do you call that a bunk?

A. Yes, bunk, a logging bunk. It is a bolster by right, but we call it a bunk. It is commonly called a bunk. And these people made preliminary contracts with me for the manufacturing of my patented device. Later they signed up a permanent contract for the manufacturing, after the bunk had been thoroughly tried out and become a useful article, that they would manufacture those bunks and pay me a royalty of so much per car per pair—that would be two bunks, which they had agreed to manufacture, the sum amounted to \$20 I believe, in the first place, and then it was finally reduced to \$10 a car royalty. During this time, while this contract was pending with me, Mr. E. G. Chandler, the defendant in this case became general manager of the company,

(Testimony of Clayton T. Eaid.)

so I understand. At least, I was referred to him in different ways, to show him some alteration made in invention in different things, by Mr. Twohy, the president of the company, and I understood that he was general manager of the concern. A little later on I took the matter up with the company. This contract was dissolved. The reason of its dissolution was the fact that Twohy Bros. Company refused to pay me the royalties that they owed me, and there was some dispute in regards to the invention, and it was dissolved by mutual consent on the 28th day of Jan., 1913. I wouldn't be positive as to the date. But we have the cancellation of it. It was absolutely canceled. The defendants went ahead with the manufacturing of the bunks, carried advertising articles of my patented bunk in the papers. And finally I said to them, "Gentlemen this contract is canceled. I wish you would not manufacture any more bunks of this particular type." I said this to Judge Twohy. Judge Twohy referred me to Mr. Chandler, and after talking the thing over, in a kind of heated argument, Mr. Chandler told me that if I had any recourse in the matter the place to settle it was in the court; that they had no further business with me, and if I thought I had any chance for to do anything, to go in the court for it.

The model you show me represents the device in question, which is known as the McConnell bunk. This device was patented to Mr. McConnell I believe in July, 1908.

(Testimony of Clayton T. Eaid.)

By argument model was offered in evidence and marked plaintiffs' exhibit C.

The principle involved in the operation of the bunk represented by the model is simply as a matter to hold the logs. The logs go lengthwise of the car. This bunk goes crossways of the car. This bunk is put up for the purpose of holding the logs securely until they are ready to unlock it. With the old method they were compelled to go underneath here and chop out a wood stake which was very dangerous.

It would operate on a truck crosswise and would be held on a center bearing. This (referring to model) holds the log. In operating that, this is the operating bar for the purpose of tripping the block on the opposite side. In pulling this bar there it throws the block down in that position, unlocks it and throws it down, so the log can roll off on the opposite side. The principle of it is to adjust this block, to shove it in any place so that you can adjust it to take different sized loads of logs. Now when she is up there, any pressure you would put against that, it is locked, set there, it can be very easily tripped by this, which is a cam movement. That throws that up and lets the log fall down. The part we claim patent on is this block, a block operating on a trunnion here, and manner of operating the block when in upright position to hold against the thrust of the logs.

Plaintiffs' Counsel. If your Honor please, if it is not perfectly clear, I would suggest that this desk

(Testimony of Clayton T. Eaid.)

could be taken as a truck. These are placed cross-wise on that, one at each end of the log, and these hold it from falling off laterally.

COURT: And the logs are simply laid in here?

Plaintiffs' Counsel. Yes. If the car be inclined, as it is for unloading, you see the logs roll by gravity.

Witness. To give you a little light on this, there are some photographs here. You can see the end of the bunk right here. The bunk goes crosswise under the load, and it trips so that you see everything stands in the clear when it is unloaded. Perhaps in a bigger picture you can get a better idea. Here is the connected truck with bunk on. That shows connection with the truck. That is what they call a connected truck.

COURT: The other is on a flat car?

A. It is on a flat car. They are to be used on either trucks or cars. There is another. That is a different design of car. It is used for the same purpose.

COURT: I want to know what you claim for your invention, on this model.

Plaintiffs' counsel. In order that the court may understand and apply the language of the patent I will ask the witness a few questions which will make it clear. If you refer to the patent you will find that there are ten claims in the case. The tenth

(Testimony of Clayton T. Eaid.)

calls for an attachment for cars comprising a chock, stop devices for engagement with the chock when in one position, and means for lowering the chock to disengage it from said devices and for sliding the chock while in lowered position.

Witness. The part that holds the log is the chock. The stop devices would be this operating stop bar. This would be the bracket here, to keep it from moving this way in or out when it is in upright position. When it is mounted, this is stop device to keep it from moving. This is the ratchet bar, mechanically stopping. The means for lowering the chock is this cam bar here, this eccentric movement with the attachment to the foot of the chock. That locks it in an upright position, and when that breaks that breaks the engagement, that gives it a chance to drop. The cam bar is this part inside of the model, eccentric movement. The outside bar is simply an operating bar, by which it can be operated from the other side.

The paper you now show me is the patent under which Mr. Chandler is claiming his rights.

Paper marked Plaintiffs' Exhibit D and received in evidence.

COURT: I suppose the only question here then, is as to whether the Chandler patent is an infringement on the other patent?

Defendants' counsel; Absolutely; there is no other

(Testimony of Clayton T. Eaid.)

question involved. Is this construction or is that patent infringed by the Chandler construction.

COURT: You admit that you are manufacturing chocks?

Defendants' counsel; We are manufacturing chocks under the Chandler patent, yes sir.

COURT: You may narrow the inquiry then to meet that issue.

Witness: I am acquainted with the construction described in the plaintiffs' exhibit D and have seen it in practice. I am the man that made it in the first place. I have an application in the patent office pending for it now.

COURT: Still, you claim that that is an infringement of the McConnell patent.

Witness: To some extent I do yes. I mean that I made plans of that invention, blue prints and drawings of it, myself—models of it—and took it to Mr. Chandler. Twohy Bros, Company, when they held the contract with me, and offered it to them as a mutual proposition under my contract, and told them at the time that I intended to file an application for patent on it. And there are some applications in the bunks where I thought there was a chance to improve them a little. This was before I dissolved the contract with them, probably three months.

The blue prints were left in the presence of these defendants on this line of invention. I was informed

(Testimony of Clayton T. Eaid.)

by their superintendent that they had burned them up, they had destroyed them, and in asking why, their superintendent, Mr. O'Brien explained that I would have to take that up with Mr. Chandler; that he had orders to destroy the prints. And I have a witness to that in case it is necessary to prove it.

The statement was made to me that it was to avoid complications that this was done.

I first became acquainted with the McConnell patent a year or a year and a half ago. I purchased an interest in it, because I thought that there was some line of invention that I wanted to use in my devices that Mr. McConnell already had covered in his patent. I brought the McConnell patent to the attention of the defendants. I talked the McConnell patent over with Mr. Chandler I think, about October, 1913. I believe it was about a month before our contract was canceled. I stated to them then that I considered this so called Chandler bunk an infringement upon the McConnell patent.

I will explain to the court the method of operation of this so called Chandler bunk from the copy of the patent. The block here, which is called the chock no. 9 apparently in fig. 1 would indicate this piece here, which seems to be a chock of similar construction to ours, with an operating trunnion here, mounted between the beams, so that it raises and lowers identically the same as ours. The function performed by it is the lowering of this chock, and the log com-

(Testimony of Clayton T. Eaid.)

ing over the top of it, the same as is done by this. When this chock is let loose to the bottom it falls down by gravity inside of the beams. This block seems to do the same thing. The Chandler model shows a bracket in here, or ratchet bar whichever you might call it, designated here as figure 6 in figure 1. That is no. 6 in figure 1. You might say notches for the purpose of adjusting this block to put it in any position where you want it to hold the log. For instance, if you want to run the block in or out, you take one log, two logs, or a full carload. When it is set out here, that is, as far as it can be set to take the full load; when it is in, it takes a smaller load. This bar does the same thing. I mean the McConnell block does the same thing. It can be adjusted in and out, and set up in different manners on the log, and is unlocked by an operating bar that extends to the other side of the car. By loosening this foot, and taking the pressure away from the foot by some means or other, this block drops between the beams, the same as the McConnell block. Now, operating mechanism here, used for locking this block in the Chandler patent is a door. This door hinged in here, is used to hold the foot of this block on this Chandler patent, instead of an operating bar here to hold the foot of it in this way in the McConnell patent. In fact, the function performed, the mechanical part involved in here, is the same. We can put a pin into this block, into their block, and make it do the same thing. In other words, we have this

(Testimony of Clayton T. Eaid.)

eccentric or cam bar in this patent, for the same effect that this is being used in another way. We are using it crosswise in the McConnell bunk while they are using it lengthwise in the Chandler bunk. The effect in the mechanical equivalents is identical, so far as the mechanical movement is concerned.

Referring now to the McConnell patent, and to the tenth claim in the Chandler model I find a chock as called for in the 10th claim of McConnell. The number in the Chandler patent is no. 9 figure 1. The stop devices for engagement with the chock when in one position that are called for as the second element of claim 10 of the McConnell patent are indicated in the Chandler patent by no. 6 in fig. 1. The bracket member 6 of the Chandler patent operates as a stop device for the Chandler chock 9 by means of the notches shown in figure 1 in the drawings. I don't see what number indicates the notches unless it would be 6 there.

I find means for lowering the chock in the Chandler model as called for in the third element of the McConnell patent; the means as shown in the Chandler patent apparently is indicated by no. 12, in figure 1. No. 12 of the Chandler patent engages the foot of the chock, no. 9 of the Chandler patent. No. 11 fig. 2 indicates the lip which stops the foot of the block 9, holds it in upright position of the Chandler patent. No. 12 of the Chandler patent is operated by a cam bar, indicated by figure 13 of the drawing of the Chand-

(Testimony of Clayton T. Eaid.)

ler patent. In fact, the cam bar must be used there to make this invention operative.

Referring to McConnell model Exhibit C, with proper allowance of proportion, the part 12 of the Chandler patent with its operating cam bar 13 could be employed by mere interchange of the parts to sustain and operate the McConnell chock. The bunk in the Chandler patent could not be operated without the use of the cam bar which is employed in the McConnell patent. The block used in the McConnell patent could be put into the device used as the Chandler patent, and used for the same purpose that the block in there is already used for.

I find the model handed me shows that the use of the cam bar and the chock block referred to in the McConnell patent can be used, with the elimination of the piece no. 12 in the Chandler patent. In other words, if the Judge would care to see the operation of this, I would be pleased to show it to him.

Whereupon the model was introduced in evidence, received and marked plaintiffs exhibit E.

The photographs shown me is one of the bunks built by Twohy Bros. Company under the Chandler patent.

Said photograph offered and received in evidence, and marked plaintiffs' exhibit F.

In claims 1, 2, 3, 4, 5 and 6 of the McConnell pat-

(Testimony of Clayton T. Eaid.)

ent, I find the subject matter of the Chandler device described.

CROSS EXAMINATION.

At the time that contract I had with Twohy Bros. Co. was canceled I received a consideration. I believe the McConnell bunk as before the court was in a way involved in the contract which I had with Twohy Bros. and which has been canceled, to this extent: There was some things involved in the McConnell patent that were built by Twohy Bros. while my contract was in existence that were supposed to be built under my contract; for instance, this bunk right here, the Chandler bunk.

I knew that the McConnell patent was in existence and had a copy of it for some time at the time I made the contract with Twohy Bros. The construction of the McConnell device was embodied in the devices being made under my contract with Twohy Bros. I do not say as here before the court. There was an application of it, which is that model right there, of the Chandler patent. That claim was copied by the McConnell patent. That was made while my contract was in existence. That is, the application of the Chandler patent was made.

This mechanical construction as it stands here was made according to the Chandler construction. That was made in their shops before the contract was canceled.

(Testimony of Clayton T. Eaid.)

Contract dated Dec. 22, 1911, between Eaid and Twohy Bros. Co. offered and received in evidence as part of cross examination and marked defendants' exhibit 1.

Defendants' Counsel: The purpose of presenting this contract was to bring out the fact that it was entered into for the purpose of manufacturing a log bunk according to Mr. Eaid's patent. These patents, I see, are dated 1913. I don't happen to have evidently an Eaid patent which was involved or intended to be covered by the contract, unless this construction was considered and the contract entered into before the patents were issued. My first question to Mr. Eaid was whether or not either of the bunks shown in these patents were the bunks had in mind at the time this contract was made; and I would like to ask, if counsel has no objection, whether these bunks were the bunks.

COURT: You mean the bunks shown in what patent?

Defendants' Counsel: Two of the Eaid patents. Patent 1,050,929, of Jan. 21, 1913, and the Eaid patent 1,055,150 of March 4, 1913.

Witness: Why I should say that these two particular types of bunks were in mind at that time. I mean the two described in the two patents that he referred to, that he has handed me copies of. These patents were applied for from the United States Pat-

(Testimony of Clayton T. Eaid.)

ent Office. I believe that one of them was granted when that contract was made, if you will look at the date.

These were not entirely the inventions that stimulated the entering into of this contract. The point is the Twohy Bros. made a contract with me to manufacture a device known as the Eaid Logging Bunk. Under that device, and under that heading, there were various different kinds of Eaid logging bunks submitted to these people for manufacture. Some were rejected and some were taken up and manufactured.

COURT: Was the Eaid logging bunk a subject of patent? A. Yes sir.

COURT: Had a patent been issued on that?

A. I believe—what is the date of that contract?

COURT: 22nd of December, 1911.

A. Well this patent is Jan. 21, 1913. It says "application filed Dec. 29, 1910"

Copies of Eaid patents introduced and received in evidence and marked defendants' exhibits 2 and 3.

The document you hand me is the cancellation of the contract entered into Dec. 22, 1911, and March also, a further contract. That covers the preliminary contract and the permanent contract which I spoke about before, that was added on the 28th of March, 1912. This is a mutual agreement between

(Testimony of Clayton T. Eaid.)

Twohy Bros. and me for cancellation of that agreement which they held with me for manufacturing bunks. As far as the contract was concerned, that brought our dealings to a close.

Cancellation of the Eaid-Twohy Bros. Co. contract introduced and received in evidence, and marked Defendants' exhibit 4.

I did not purchase the interest in the McConnell patent for the sole purpose of bringing this suit against Twohy Bros. One reason I did not purchase it sooner was that I hadn't sufficient funds to operate, on account of Twohy Bros. holding me up on some of my profits that belonged to me. And another reason was that there was some little things into that, that I thought would be beneficial to me, and I figured to pick them up as I got to it, because I had an invention along that line, and I figured that I might want to use some of the claims in that patent.

I have never made a full sized working bunk involving the construction as embodied in plaintiffs' exhibit C.

Q. I am asking the witness to designate the elements which operate or actuate this chock.

COURT: You may answer that question.

A. Do you want me to describe that by the numbers?

Q. I am asking you to designate.

A. I would like to hear that question again.

(Question read.)

(Testimony of Clayton T. Eaid.)

COURT: Parallel actuating what?

Mr. LITZENBERG: Paralel actuating shafts 4 and 5 the bottom of page 1 of the McConnell patent. The point is I want to bring out that they have provided specific means for positively actuating their chock in order to move it into and out of engagement with their stop devices, which stop devices constitute their ratchet or notches and the cam portion 19 on the McConnell patent. And I want simply to identify the means for, as the claim says, lowering the chock. That is a positive movement.

A. These means for lowering the chock would be this cam movement here and the actuating bars.

Q. The actuating bar?

A. And the cam movement.

Q. Well that is a crank pin?

A. That is a cam movement, or crank shaft, as you might call it. Mechanically they use both.

I understand the word "actuating" to mean holding in position to keep it from moving. It is anything that causes it to move or to hold it to keep it from moving, or to cause it to move when it was released. That is the way I would term it, from a mechanical standpoint. The purpose of lowering the chock is to let the log off the car; so that the log can roll over the top of it to get off. Otherwise, it couldn't. If you didn't lower the chock, your chock would be locked, and you couldn't lower the log.

As I would understand the language "to disen-

(Testimony of Clayton T. Eaid.)

gage it from said device" claim 10, that would mean for lowering it, putting it down out of the way so the log would roll over it. That would be my construction if it.

I do not profess to be a mechanical engineer. I have had very little technical mechanical training. In fact, about my mechanical experience, it has been actual personal experience.

REDIRECT EXAMINATION.

There were two contracts which I had with certain of the defendants. One was a contract, which was a preliminary contract, that was signed up in 1911, for the purpose of giving the defendants a chance to find out whether the bunks that were being built at that time were operative or not, and whether they would be a success. And then later on there was another contract, that was simply a continuance of the first one. They decided the proposition was all right, and then they signed up a permanent contract for premanent manufacture. The object in making these contracts was to try and get something out of my patents, to get somebody to take hold of the manufacturing of them and manufacture it in a big way, so that I could receive some royalties as profits from my invention.

I received such assistance from the defendants in a very small way. In fact, the profits that I got from it so far wouldn't more than overcome the time and money that I have expended.

(Testimony of Clayton T. Eaid.)

I know the instrument you show me. It is the contract between myself and the defendants, Twohy Bros. Co. That is the second contract that I have referred to.

The supplemental contract introduced and received in evidence, and marked plaintiffs' exhibit G.

I was engaged in promoting the manufacture of a line of bunks to be called the Eaid bunk, and I entered into these contracts with Twohy Bros. Co. to assist me in producing these bunks commercially. The principal reason for terminating the contracts was that the contract was not carried out. The contract was breached by them. They didn't manufacture the stuff as they agreed to do, or didn't turn it out in a workmanlike manner. On the other hand, they didn't manufacture the stuff in good faith as they agreed to do, and there was several points where they breached their contract with me. Another thing was, I was denied the right to go in to see their records to know how many bunks they had built at any time, which I was entitled to under the contract. It was provided in the contract that the articles put onto the market should be marked "patent applied for". That was never done. Upon the cancellation of the contracts, there was a check for \$250.00 paid to me for royalties on the bunks that had already been built under my contract, which was accrued payments due under the contract. I

(Testimony of Clayton T. Eaid.)

demanded payment before entering into the cancellation of the contract.

There was a little question there when that assignment was made in regard to what I was entitled to in royalties. That is the cancellation of the contract. Mr. Chandler, the defendant, tried to build entirely another type of bunk, which I considered came under my patent, and tried to deny me the right of collecting royalties under my contract with the Twohy Bros. Co.

Q. When you refer to the bunk that was being contrived or built by Mr. Chandler, do you refer to that one that is represented by this model here?

A. That bunk was under construction at that time, along with another type that has not been introduced here.

The date of cancellation of the contract is March 27, 1913. (Defendant's exhibit 4.)

My principal reason for purchasing an interest in the McConnell patent was because I was going along the lines of invention in making some improvements, what I considered that might be improvements to the bunk we were already building, that I thought there were some principals involved in the McConnell patent at that time—this block here operated on a trunnion with a pivot—which I might possibly want to use, and I didn't believe I could get around. In other words, I thought it would be necessary to

(Testimony of Clinton F. Blake.)

have that for the completion of some other inventions that I intended to make and did make on this type of bunk.

Excused.

CLINTON F. BLAKE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a mechanical engineer. I served as chief draughtman for the Industrial Works at Bay City, Michigan, manufacturers of cranes and railroad equipment. I served as designing engineer for the Shaw Electric Crane Company, Muskegon, Michigan. I served as chief engineer of the Calumet Engineering works, of Harvey, Illinois. And I am now in practice here at Portland. I have designed heavy work here. The last work was the machinery on the public docks. Also considerable work for the Portland Railway Light and Power Company at Bull Run and other large work.

I have examined the plaintiffs' exhibits A and D, being respectively the McConnell and Chandler patents and am acquainted with their contents. I have seen the Twohy bunk, which agrees in every essential particular with the same as exhibited and exposed in the Chandler patent, in actual operation in the woods. The Twohy bunk is the same as that model defendants exhibit here.

(Testimony of Clinton F. Blake.)

Referring to claim 10 of the McConnell patent the elements are a chock and stop device, and means for lowering the chock device. I find these elements in the Chandler patent. In claim 10 of the McConnell patent we have a chock, which is shown as 9 on the Chandler patent. In figure 1 and figure 2, figure 3 and figure 4; all figures. In the McConnell patent we have stop devices which in the Chandler patent are shown as no. 6 in all the views. In the McConnell patent we have means for lowering the chock, which in the Chandler patent would be no. 13, the shaft with its crank portion 15 and the dog 12. It is my professional opinion as a mechanical expert that the means for lowering the chock to disengage it from the stop devices shown in the Chandler patent are the substantial mechanical equivalents of the means shown in the McConnell patent. I would regard the means shown in the Chandler patent as interchangeable with the means shown in the McConnell patent, allowance being made for proportion. They perform the same functions and arrive at the same result. By that I mean that the operating devices shown in this Chandler patent could be incorporated in the McConnell patent to operate the chock and stop devices as shown in the McConnell patent.

Plaintiffs' exhibit F shown me is a model of what is know as a lumber block. The chock, the stop device, and means for lowering the chock, defined

(Testimony of Clinton F. Blake.)

in claim 10 of the McConnell patent are found in the model. I would consider the subject matter of plaintiffs' exhibit E and the subject matter disclosed in the Chandler patents mechanical equivalents. I find only part of the elements of the Chandler device in Exhibit E; the essential elements are here. I find the dog 12 omitted. Its function of the Chandler patent is to lock the chock 9 in an operative position. The bend or crank portion of the shaft in Exhibit E would correspond to it. The bend or crank portion 15 of the shaft 13 of the Chandler would perform the same function without the dog 12 of the Chandler as with it, if it were located according to the requirements of that function. The dog 12 performs no other purpose than locking. The incline of lip 11 in figure 3 of the Chandler patent, is made such that when the dog is released by operating of the shaft 13 the dog will by gravity leave lip 11. The dog is essential as far as the drawings show here, in the present location of the shaft, but it could be made very easily to operate without the dog. And such change would be by the introduction of mechanical equivalents for that which is shown in the McConnell patent or in the Chandler patent. Referring to the McConnell patent, claim one we find "parallel beams, means for securing the beams to a car platform, oppositely disposed chocks, fixed means for engaging the chocks, and means for actuating the chocks." I find all of these elements in combination in the Chandler patent, but the means

(Testimony of Clinton F. Blake.)

for securing the beams to a car platform. I don't find that in the Chandler patent.

The element parallel beams in the Chandler patent is found substantially to be shown as nos. 1 and 2, the vertical side plates.

Q. Do you find "means for securing the beams to a car platform" in the Chandler patent?

A. I don't find any means shown, but I suppose they would be intended, as it must be secured.

From my knowledge of the art, that bunk could not be used upon a truck without securing it to the truck. So the means for securing it to the truck are necessarily implied in the bunk. I will indicate by reference to the Chandler drawing the "oppositely disposed chocks pivotally and movably mounted between the beams." No. 9 of the Chandler patent. Those chocks answer the description of the third element of the McConnell claim one.

In the Chandler patent "fixed means for engaging the chocks when elevated" are represented by the side plates 6 with their notches or corrugations. "Means carried by the beams for actuating the chocks" is indicated by shaft 13 with its crank portion 15 and dog 12, Chandler patent.

The combination described in claim one of the McConnell patent described elements found in combination in the Chandler patent. The combination

(Testimony of Clinton F. Blake.)

of the two patents arrive at the same result and by substantially the same means.

Referring to claim 2 of the McConnell patent I find the elements as follows: Beams, stop and guide devices, chocks, means carried by the chocks for engaging the devices, and means for actuating the chocks. Referring to the Chandler patent nos. 1 and 2 of the Chandler patent indicate the beams called for in the McConnell patent. "Combined stop and guide devices fixedly carried thereby" would be composed of member 6 with member 3. That is the top plate. It is omitted from the exhibit model. The chocks called for in claim 2 of the McConnell patent are indicated by no. 9 of the Chandler patent. Chocks 9 of the Chandler patent are pivotably and slidably mounted within the stop and guide devices shown therein. "Means carried by the chocks for engaging the devices", to wit, the stop and guide devices are trunnions on the Chandler patent. The means for actuating the chocks is indicated on the Chandler patent with shaft 13 with its crank portion 15 and dog 12.

Q. How do the elements named in your last answer cooperate with chocks 9 to effect operation?

A. When the chock 9 is thrown into upright position, the shaft 13 by reason of its crank portion 15 when it is thrown over, throws the dog 12 into engagement with the extending lip 11 upon the lower portion of the chock.

(Testimony of Clinton F. Blake.)

In figure 4 of the McConnell patent, the pin no. 24 is the equivalent of lip 11 of the Chandler patent.

As to claims 3, 4, 5 and 6 of the McConnell patent, I find substantial equivalents of the several combinations therein defined in the subject matter of the Chandler patent.

CROSS EXAMINATION.

I have had no actual experience in building car bunks. My knowledge of this case has been largely acquired by the study of these patents since I was engaged to give testimony.

Referring to the drawings of the McConnell patent, the stop device is no. 15 as shown in detail in fig. 3; also shown in fig. 2. The notches shown in figure 3 constitute the stop; I don't find the reference figure for them. The trunnion is engaged by the notches; it seems to be designated by several numbers, nos. 19 and 18, two different portions of the same trunnion.

Q. Is it not true that 18 constitutes the trunnion which slides in the slideway 16. Looking at figures 3 and 4 of the McConnell patent it is very clear. Is it not true that the trunnion proper designated 18, slides in the slideway 16 of figure 3?

A. That portion 18 of the trunnion slides in the slideway 16, fig. 3.

Q. Is it not also true that the cam portion designated 19, shown clearly in figure 4 is so positioned as to

(Testimony of Clinton F. Blake.)

move over these notches when the chock is in one position, and when in another position the cam portion 19 moves down into and engaged the notches 15?

A. No. sir. The cam portion 19 seems never to enter the slots. Seems never to enter the notches. The cam portion 19 is this upper portion here. That is on top of the trunnions here and right on the top of these notches.

Defendants' Counsel: Let me read just a few lines from the specification: "Secured to the adjoining faces of the beams 3 of each bar are combined guiding and stop devices such as shown in fig. 3 and each of which consists of a face plate 14 having an integral longitudinally extending ratchet bar 15. A longitudinally channeled guid 16 is formed integral with plate 14 and located above but beyond the side of the ratchet bar. Four of these guide and stop devices are used in connection with each pair of beams 3, said devices being arranged in parts as indicated in fig. 1 and adjacent the ends of the beams. Interposed between the stop devices of each pair is a chock consisting of a bowed or curved arm 17 having trunnions 18 designed to travel within the guides 16. Those portions of the trunnions outside of the guides and above the ratchet bars 15 are provided with cam faces 19 terminating in shoulders 20 designed, when the arm 17 is swung upward, to turn downward into engagement with the adjoining teeth of the ratchet bars." Those ratchet bars constitute the fixed means,

(Testimony of Clinton F. Blake.)

and when we read in claim 10 "stop devices for engagement with the chock when in one position" that means that when the chock is in its raised or operative position, that cam portion 19 engages these stop devices?

Plaintiffs' Counsel: Objected to. Counsel is reading into the claim something which does not appear in the claim. He first reads from the specification, then from the claim, and his reading into the claim that which is not found in the claim will tend to confuse the mind of the witness. The specification can be used to construe a claim which is ambiguous, but the question should be directed clearly to the witness to determine what he finds in the claim, and not to read at one time the specification, and then by inference to carry that specification into the claim.

Defendants' Counsel: I am not reading into the claim anything that is not there. I am simply referring to the specification, as is amply sustained in the decisions, to ascertain the meaning of the language used in the claim.

Plaintiffs' Counsel: If your Honor please, in the words, that is in the upright position, he is construing into that claim what is open to the construction of the court, and he is confusing the mind of the witness by a suggestion of a construction which is not in the claim and which the court has not pronounced upon. In other words there are words in that question which, if they appear to the mind of

(Testimony of Clinton F. Blake.)

the witness or not, will appear in the record as suggesting something in the claim that is not there, and I can point them out.

COURT: Well, you can clear that up after he answers this question, if it seems ambiguous.

Plaintiffs' Counsel: The objection of course is reserved to the question.

COURT: Yes, I understand.

A. According to this drawing of the McConnell patent, as I read it, the numeral here 19, with its reference in fig. 4 does not go to the part of that trunnion which projects to those notches. That was the reason I answered the previous question as I did.

In claim 10 we find for the purpose of "lowering the chock to disengage it from said devices." Said devices, are the notches on member 15. It need not necessarily be disengaged before it can be slid along. The claim says "means for lowering the chock to disengage it from said devices and for sliding the chock while in lowered position." That is the latter part of claim 10; it must be lowered in this position to be operated. It cannot be slid when it is in the raised position, because the trunnions bearing upon the guide there forces this dog portion down into the notches in piece no. 14. By dog portions, I mean cam 19.

Referring to the Chandler patent part no. 6 is in engagement with the chock in every position of the

(Testimony of Clinton F. Blake.)

chock. When the chock in the Chandler patent is lowered, while it is true that the trunnions 10 would still rest on the corrugations, it would be disengaged to the extent that it would then be moved, it would not be locked into engagement with piece 6 any further.

It is still engaged with the piece 6 but not in an operative sense, in the same manner that it was before.

It is true that there are two trunnions which rest in these seats, and they are in engagement no matter into what position the chock is moved. The chock in the Chandler patent can be slid back and forth by lifting the trunnions out of the notches and moving it back and forth, referring to the claim 10. It doesn't slide on guides, but it is the equivalent of sliding.

Q. In the McConnell patent you have slideways outside of the stop devices in which the trunnions proper slide. Does the chock of the Chandler patent slide as does the chock of the McConnell patent?

A. I should say that it depends upon the construction of that word "slide" and just what you mean. Of, course, it doesn't slide on guides the same as the McConnell patent does.

The means for lowering the chock in the McConnell patent is this arm 25 and the link 22. Through the shaft 5 and the link 25, and the arm or link 22 the chock of the McConnell patent is positively moved or positively actuated, the purpose being to draw

(Testimony of Clinton F. Blake.)

these cams out of engagement with the fixed stop devices. In a full sized working machine it would be necessary to have such a device as this for positively moving the chock to disengage it from the stop devices.

In the Chandler device I find no means for positively moving the chock. I find there a latch mechanism for releasing the chock and the chock then is free to be moved when it is released.

Certified copy of the file wrapper of the McConnell patent, showing the application as originally filed, with claims as amended during the prosecution of the application, introduced and received in evidence and marked defendants' exhibit 5.

REDIRECT EXAMINATION.

I have stated that by means of the members 22 and 25 in the McConnell patent, the chock shown in that patent is adapted to be positively actuated. The chock could not be operated without such members 22 and 25.

The chock of the McConnell patent may be actuated by direct manipulation, just as the chock 9 of the Chandler patent may be operated, certainly. That is adjusted back and forth and thrown up.

You cannot release that from this end; it cannot be reached; but it can be operated, adjusted and

(Testimony of Clinton F. Blake.)

thrown into position from this end without handling the rest of the mechanism.

You may therefore, use the members 22 and 25 for setting the McConnell chock, or you may set the McConnell chock just as the Chandler chock, is set, by direct manipulation. When set by direct manipulation parts 25 and 22 perform the function of locking the chock into operative position. This is substantially the same as the means for locking the chock shown in the Chandler patent.

I do not wish to be understood as stating that the McConnell chock is operated by any different means—is necessarily operated by any means different from those employed in the Chandler. The two chocks are operated by exactly the same means.

There has been a question raised here as to whether the McConnell chock slides from one position to another, and whether the Chandler patent does likewise; substantially I should hold that they both slide. The fact that the McConnell patent has to be lifted over—it can easily be slid over, like that. The Chandler patent,—they both move endwise. As a matter of fact the McConnell chock slides in a straight line and the Chandler patent slides in an undulatory line. Both slide. The sliding of the two is directed toward the accomplishment of the same result, or substantially the same result, the same end, which is to adjust the chock to positions suitable for the different sized of loads, logs on a car;

(Testimony of E. G. Chandler.)

that is, the number of logs on the car. If we had only two logs on this car, two large logs, we would probably have to have this chock slide in here. If we had three large logs, we would probably have to have it out.

RECROSS EXAMINATION.

In connection with claim 10, of the McConnell patent we read "Means for lowering the chock to disengage it from said devices and for sliding the chock while in lowered position." That means any device or method of sliding the chock when it is disengaged from its holding. As shown on the drawing it would be link 22 and arm 25. I do not find such parts as that on the Chandler patent for moving the chock.

PLAINTIFFS REST.

E. G. CHANDLER, callsed as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

My name is E. G. Chandler; age 36; I am president of the Northwestern Equipment Company and have management of the shops of Twohy Bros. I am also a mechanical engineer.

I am patentee mentioned in the original patent handed me no. 1066795 dated July 8, 1913, granted

(Testimony of E. G. Chandler.)

to E. G. Chandler. The chock or the log bunk here described and claimed is my invention. As to the developments leading up to the invention of this log bunk will state there are a number of bunks on the market which perform the operation of carrying logs in trucks and flat cars, to a more or less extent, but most of them have some defect in their construction, and for one reason or another most of them have been rejected by certain users of log bunks; and in the construction of trucks which we are building at the Twohy Bros. plant, it became necessary to have a bunk which would meet all of the requirements of the logger, both as to adjustability and safety and *each* of operation; and after a great deal of study and time spent on the subject, I finally conceived the idea of the bunk as set forth in the patent which has been issued to me, and we have proceeded with the construction of them.

I was not with Twohy Bros. Company at the time the contract Defendants Exhibit 1, between C. T. Eaid and Twohy Bros, was entered into. I became acquainted with Twohy Bros. Company during the life of that contract.

Q. I hand you two patents granted to C. T. Eaid, defendants' exhibit 2 and 3 and will ask you if either of the bunks shown and described in those patents was the bunk that the Twohy Bros. were manufacturing at the time you became connected with them?

A. Twohy Bros. were manufacturing a modification of the bunk shown on patent no. 10555150.

(Testimony of E. G. Chandler.)

They were manufacturing it at that time. They were selling that bunk under this contract. It was not giving satisfaction as a merchantable device. In the first place, the bunk was too weak, and its mechanical construction was such that after very short service it failed absolutely to work.

Mr. Eaid never presented to me, or to my knowledge presented to any one connected with the company, any drawings or suggestions of this Chandler bunk.

Model offered and received in evidence and marked Defendants' exhibit 6.

It was almost impossible to make sales of the Eaid bunk, because after the bunks were out on the work they failed to perform the service for which they were put out, and while we sent out a number of bunks on trial, there were only four of them that were ever paid for.

Mr. Eaid never showed me or made any suggestions to me of the mechanical construction embodied in the device on which you secured your letters patent referred to. It is my own original invention, worked out after these difficulties arose in connection with the other bunk which we were manufacturing. The purpose of my bunk was to provide a chock which could be released and entirely adjusted to any relative position, or which could be removed.

Excused.

(Testimony of T. O'Brien and J. C. Streng.)

T. O'BRIEN, called on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am superintendent of Twohy Bros. shop; have been with this company for three years and a half. I was connected with the company at the time Mr. Eaid entered into his contract with them for making his bunk. That bunk was built by Twohy Bros. It was practically the same bunk as is shown in the Eaid patent no. 1055150. Mr. Eaid never at any time presented to me any blue prints or any drawings, or any sketches, showing the construction embodied in the Chandler bunk. This Chandler bunk was first brought out about fifteen months ago. After it was brought out, the company discontinued making the bunk which it had been making under the Eaid plan.

Excused.

J. C. STRENG, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am J. C. Strong; I am a mechanical engineer 52 years old. I have been in mechanical work for 30 years; for about 8 years with the Industrial Works, at Bay City, Michigan, manufacturing all kinds of railway appliances, cranes, derricks and such matters,

(Testimony of J. C. Streng.)

and successively with that firm as draughtsman, chief draughtsman, and erecting engineer. Then successively with the Bucyrus Company as draughtsman, chief draughtsman, and assistant engineer. And then as designing engineer with firms in Chicago, Hoover and Mason, consulting and designing engineers. And then with the Brown Hoisting Machinery Company of Cleveland, Ohio. Then with the Wellman Seaver Morgan Company, Cleveland, Ohio, as designing engineer. Since then I have been in Portland in business for myself.

Referring to the McConnell patent, claim 10, the first stop device that comes into notice there is the cam or pawl, which is integral with the chock, which engages the ratchet teeth. I also find that back in the operating connection the arm 25, I think it is, which connects the operating shaft with that connecting bar 22, that arm comes down and locks there. That maintains it; that together with the stop 19. The "Stop devices for engagement with the chock when in one position" refers to the pawl or cam; that is on the chock, inherent in the chock. In figure 3 of the drawings of the McConnell patent, the stop devices are the ratchet teeth which are shown there; also the slide that has been referred to as no. 16.

Q. Referring to figure 4, which shows the chock, what portions of the chock are adapted to the element shown in figure 3?

(Testimony of J. C. Streng.)

A. The trunnions 18 slide in the guide 16 and the pawl or dog 19 engages with the ratchet teeth shown in figure 3. That is, not in all positions. When the operating means are used to throw the chock into its upward or holding position, as it performs this motion, the dog 19 which is integral with the chock, revolves down into a ratchet space, and catches against the tooth which is next. That is for holding the chock in its position against a lateral movement. In order to adjust the chock, or slide the chock, it is necessary to operate the actuating bar 22 and pull it back, I should say.

Referring to plaintiffs' exhibit C, it differs in its construction and operation from the Chandler chock as follows: The McConnell patent has the brackets fastened to the beams, with the ratchet teeth, and the sliding groove for sliding of the trunnions. In contrast to that, this has not that, it has no ratchet teeth; it has no sliding groove whatever. And this has those ratchet teeth there in order to hold that dog from sliding that way. This has not. This has the corrugated seats for holding the trunnion. These trunnions are pivotal in those seats. In this case the trunnion rolls in the sliding surface, and thereby disengages that dog, which is integral with the chock, and raises it out of its position when this is released. I don't find that at all on this model. Another thing in the operation, in the McConnell patent, in order to put this chock into position this

(Testimony of J. C. Streng.)

lever must be moved forward like that, locking this in this position and holding it there against this shoulder, against the ratchet teeth. In this case the chock is held, in the Chandler patent, in position by a dog, which I believe is no. 12 in the patent; that dog rests against the lip no. 11 in the Chandler patent, prevent the chock from moving, or rather I should say from revolving. I also notice, one other thing, that has not been mentioned here; that in the Chandler patent, when the chock is in this upright position, it may be moved back without disengaging the operating handle, to any adjustable position, so that you may, without interfering with the operating mechanism, adjust it to suit any width on the bunk. I also notice in the operating of this chock, when it is desired to release it, that all that is necessary is to release this lever, and the chock falls of itself. That is a part that is an inherent part of the chock as designed by the patentee. This upper end here being heavy, so that gravity makes it drop.

There is no way of releasing the chock of the McConnell patent without moving the operating lever. By moving that lever you rotate the chock and any further rotation of that draws the chock back and slides it in the slide designed for it.

Q. As a mechanical engineer, in your judgment, is this a practical car bunk, operative car bunk?

A. Well, that is a question that is not dependent

(Testimony of J. C. Streng.)

on this model. It might be done so. I heard the testimony and I think it might be possible. I dont know what the difficulties have been with this model or in its construction, and I have not seen them, so I could make no comparison of this and that as far as the mechanical device is concerned.

The language found in claim 10 of the McConnell patent, which reads "means for lowering the chock to disengage it," has reference to the mechanical means for positively moving the chock. That positive movement of the chock, as referred to in the claim is necessary in order to disengage it from the stop devices. In a full sized working model of the McConnell construction, in my judgment there would be friction between the stop device, the notch and the cam face bearing against it, caused by the log bearing against the chock which would make it necessary, in order to release the chock, to positively pull or actuate the chock. It would be necessary to positively pull the thing, in order to overcome that friction contact caused by the weight of the log against the two flat surfaces.

COURT: That is holding there with the log? You have to pull it to release it.

A. That becomes a fulcrum of the first order.

CROSS EXAMINATION.

I have never made any practical experiments with either one of these models. This is the first model

(Testimony of J. C. Streng.)

of the McConnell device I have seen, but I have seen the drawings and studied them and some others at the same time. This as well.

Q. The same operation ensues in respect to the Chandler bunk as there would in the McConnell, with reference to your last answer?

A. No, no. It is entirely different.

COURT: If there is a pressure on there, how would you release it?

A. That is released by releasing the latch. They have to operate the handles to release the chock in either case. That is, in the McConnell patent, the operation of the handle operates the chock; and in the Chandler patent the operation of the handle operates the latch; then the dog falls away by gravity and the pressure, and then the chock rolls over, on account of its weight, its unbalanced weight with the load against it from the logs. The remote operation in each case is not the same. The operation of the handle does not directly depress the chock in each case. The operation of a handle permits the depression of the chock in each instance. It doesn't actuate it. There is a difference between permitting and actuating. In this case gravity has a great deal to do with it, and also the angle at which the dog strikes the lip on the chock.

I have no connection with the defendants.

(Testimony of J. C. Streng.)

Patent to Cicero D. Matheny no. 513,124 Jan. 23, 1894 offered and received in evidence and marked defendants' exhibit 7.

Patent no. 790,915 of May 30, 1905, to Thomas D. Parsons offered and received in evidence and marked defendants' exhibit 8.

Patent no. 770,899 of Sept. 27, 1904, to Mason Foshee, introduced and received in evidence and marked defendants' exhibit 9.

Defendants' counsel then offered in evidence for the purpose of showing something of the prior state of the art the patent to Manly Wilbur marked defendants' exhibit 10 and patent to Robert J. Thompson marked defendants' exhibit 11, and patent to Geo. W. Warner marked defendants exhibit 12, to which offer plaintiffs' counsel objected upon the ground that none of said patents were certified or authenticated, which objection was sustained, to which ruling the defendants excepted.

It is hereby stipulated that the foregoing condensation of the testimony and evidence is a true, complete and properly prepared statement and condensation of said evidence and testimony together with plaintiffs' exhibits A to G inclusive, which are hereto annexed, excepting plaintiffs' exhibits C and E which are models, and including defendants' exhibits 1 to 12 inclusive, excepting defendants' exhibit 6 which

is a model, and that the same may be certified as above by the judge of said court without further notice.

STAPLETON & SLEIGHT &
JOS. L. ATKINS

Attys. for Ptff.

WM. R. LITZENBERG

Attys. for Dfts.

I, CHAS E. WOLVERTON, the judge before whom the above entitled cause was tried, hereby certify that the foregoing statement and condensation is a true, complete and properly prepared statement and condensation of the evidence and testimony introduced and offered on the trial of the foregoing cause, including the exhibits hereto attached, marked plaintiffs' exhibits A to G inclusive except plaintiffs exhibits C and E which are models, and including defendants exhibits 1 to 12 inclusive, excepting defendants' exhibit 6 which is a model, and that the said condensation and statement of the evidence shall constitute a part of the record in this cause.

CHAS. E. WOLVERTON

Judge.

Dated Jan. 5, 1915.

Plaintiff's Exhibit "A."

□ 73

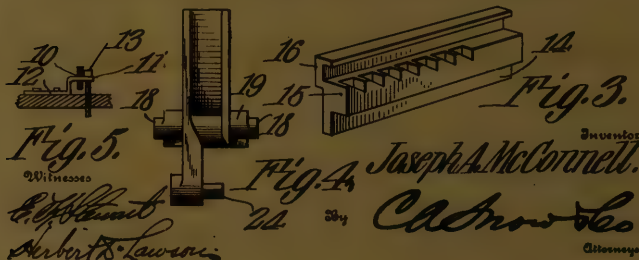
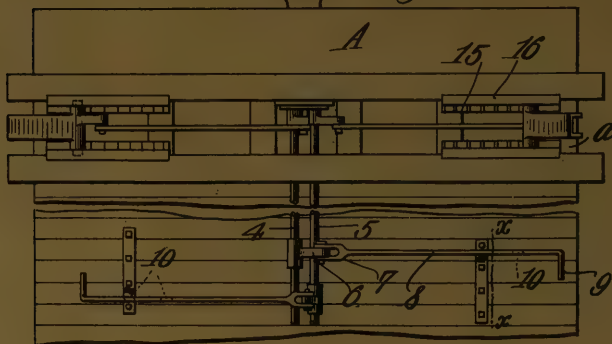
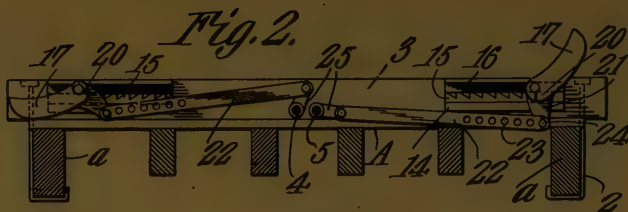
PLAINTIFF'S EXHIBIT "A"

0574

J. A. McCONNELL.
 CHOOK ATTACHMENT FOR CARS.
 APPLICATION FILED JAN. 24, 1908.

901,815.

Patented Oct. 20, 1908.



UNITED STATES PATENT OFFICE.

JOSEPH A. McCONNELL, OF DALLAS, OREGON.

CHOCK ATTACHMENT FOR CARS.

No. 901,815.

Specification of Letters Patent.

Patented Oct. 20, 1908.

Application filed January 24, 1908. Serial No. 412,457.

To all whom it may concern:

Be it known that I, JOSEPH A. McCONNELL, a citizen of the United States, residing at Dallas, in the county of Polk and State of Oregon, have invented a new and useful Chock Attachment for Cars, of which the following is a specification.

This invention relates to logging cars and the like and more particularly to chock attachments designed to be secured upon a car for the purpose of holding logs or timbers against displacement upon the car.

Another object is to provide an adjustable chock which, when in operative position, is securely held in place and can not be forced accidentally out of proper position.

Another object is to provide novel means whereby chocks can be moved into lowered position, said means being so disposed that there is no danger of the released logs falling upon the operator.

Another object is to provide simple means for detachably securing the attachment to a car.

With these and other objects in view the invention consists of certain novel features of construction and combinations of parts which will be hereinafter more fully described and pointed out in the claims.

In the accompanying drawings is shown the preferred form of the invention.

In said drawings: Figure 1 is a plan view of a portion of a car having the attachment thereon. Fig. 2 is a longitudinal section through the attachment, said section being taken transversely of the car platform and the chock being shown in elevation. Fig. 3 is a detail view of one of the combined guides and stops used in connection with each chock. Fig. 4 is an outside elevation of one of the chocks. Fig. 5 is a section on line *x-x*, Fig. 1.

Referring to the figures by characters of reference, A designates a car platform of any preferred construction and the side sills thereof are designed to be engaged by the hooked ends 1 of bolts 2 which extend downward through and are secured within the ends of parallel beams 3. These beams extend transversely of the platform and are arranged in pairs. Parallel actuating shafts 4 and 5 are journaled within the middle portions of all of the beams employed and extending from the middle portion of each of these shafts is an arm 6 to which is piv-

otally connected the forked end 7 of an actuating rod 8. These rods extend toward opposite sides of the platform and are provided with grips 9 at their outer ends so that they may be conveniently manipulated. Openings 10 are formed within each rod and designed to receive the offset end 11 of a holding member 12 which is bolted or otherwise fastened to the car platform. A retaining pin 13 may be extended downward through the offset end of each holding member and into the car platform as indicated in Fig. 5, said pin serving to confine the operating bar 8 and prevent it from accidentally slipping off of the end 11 engaging it. Secured to the adjoining faces of the beams 3 of each bar are combined guiding and stop devices such as shown in Fig. 3 and each of which consists of a face plate 14 having an integral longitudinally extending ratchet bar 15. A longitudinally channeled guide 16 is formed integral with plate 14 and located above but beyond the side of the ratchet bar. Four of these guide and stop devices are used in connection with each pair of beams 3, said devices being arranged in pairs as indicated in Fig. 1 and adjacent the ends of the beams. Interposed between the stop devices of each pair is a chock consisting of a bowed or curved arm 17 having trunnions 18 designed to travel within the guides 16. Those portions of the trunnions outside of the guides and above the ratchet bars 15 are provided with cam faces 19 terminating in shoulders 20 designed, when the arm 17 is swung upward, to turn downward into engagement with the adjoining teeth of the ratchet bars. An arm 21 extends downward from each of the chocks and pivotally connected to it is a link 22 having a series of apertures 23 any one of which is designed to receive a wrist pin 24 extending from arm 21. The link 22 of one of the chocks is connected to a crank arm 5 extending from the adjoining shaft 5 while the chock at the other side of the car is similarly connected to the crank arm 25 extending from the other shaft 4.

As heretofore stated any desired number of chocks may be secured upon the platform and the pairs of beams 3 can be adjusted toward or from each other so as to hold either long or short logs. This adjustment is permissible in view of the facts that the shafts 4 and 5 extend through all of the

beams and said beams can be slid thereon. After the various beams have been properly positioned and then secured by tightening the bolts 2 the chocks can be adjusted so as to engage the links 22 at any desired points. After this adjustment is effected the operator releases the bars 8 and pushes them inwardly. This will cause shafts 4 and 5 to be partly rotated and motion will be transmitted through arms 25 to links 22. Arms 21 will therefore be swung outwardly and move the shoulders 20 downward into engagement with the adjoining ratchet teeth. This operation will bring the shaft 5, wrist pin 24, and the pivotal connection between link 22 and arm 25 practically in alinement so that each chock becomes locked in an elevated position and it is impossible to lower it by exerting pressure thereagainst. Logs can therefore be loaded upon the car and will be held securely in place by the elevated chocks, said logs resting upon the beams 3 and located above the shafts 4 and 5 and their connections. When it is desired to dump the logs the car is placed in an inclined position and the operator goes to the elevated side of the car and pulls outwardly upon the operating arm 8. This causes the shaft to which the bar is connected to partly rotate and to pull on its link 22. The arms 21 of the chocks at the lower side of the car will thus be pulled inwardly simultaneously and the partial rotation of the trunnions which is thus produced serves to withdraw the shoulders 20 from engagement with the ratchet teeth and the chock is free to swing downward and move inwardly. The logs will therefore roll off of the lower side of the car and all danger of injury to the operator who is positioned at the other side thereof is eliminated.

What is claimed is:

1. An attachment for cars comprising parallel beams, means for securing the beams to a car platform, oppositely disposed chocks pivotally and movably mounted between the beams, fixed means for engaging the chocks when elevated only to hold them against sliding movement in one direction, and means carried by the beams for actuating the chocks.

2. An attachment for cars comprising beams, combined stop and guide devices fixedly carried thereby, chocks pivotally and slidably mounted within said devices, means carried by the chocks for engaging the devices only when the chocks are raised to limit the sliding movement of the chocks, and means carried by the beams for actuating the chocks.

3. An attachment for cars comprising beams, combined guide and stop devices carried thereby, chocks pivotally and slidably mounted within said devices, means integral with the chocks for engaging the devices to

limit the movement of the chocks in one direction, and separate means for elevating the chocks.

4. An attachment for cars comprising beams, combined guide and stop devices 70 fixedly carried thereby, chocks pivotally and slidably mounted within said devices, means integral with the chocks for engaging the devices only when the chock is raised to limit the sliding movement of the chocks in one direction, and means extending toward one end of the beams for actuating the chock adjacent the other end thereof.

5. An attachment for cars comprising beams, a chock pivotally and slidably mounted between the end portions thereof, a shaft 80 journaled within the beams, a crank arm carried thereby, a link connection between said arm and chock, and means cooperating with the chock for limiting its movement in one direction, said crank arm and link being disposed to lock the chock in an elevated position.

6. An attachment for cars comprising beams, a shaft journaled therein, chocks pivotally and slidably mounted between the beams, means cooperating with the chocks for limiting the movement of each chock in one direction, an arm upon each shaft, a link connection between said arm and one of the chocks, said arm and connection being disposed to lock the chock in an elevated position, and crossed oppositely extending means for actuating the shafts.

7. An attachment for cars comprising 100 beams, ratchet bars secured to the adjoining faces of the beams, laterally offset longitudinal guides integral with said bars, a chock interposed between the bars, trunnions thereon slidably and pivotally mounted within the guides, said trunnions having shoulders for engaging the ratchet bars when shifted to a predetermined position, and means for actuating the chock.

8. An attachment for cars comprising 110 beams, ratchet bars secured to the adjoining faces of the beams, laterally offset longitudinal guides integral with said bars, a chock interposed between the bars, trunnions thereon slidably and pivotally mounted within the guides, said trunnions having shoulders for engaging the ratchet bars when shifted to a predetermined position, a shaft journaled within the beams, a crank arm extending thereabove, a link connection between the arm and chock, said arm and connection being disposed to cooperate with the shoulders to lock the chock against movement when in elevated position.

9. The combination with a car platform; 125 of cross beams mounted thereon, means carried thereby for detachably connecting the platform, shafts journaled within the beams and extending longitudinally of the platform, crossed actuating means connected to 130

the respective shafts and extending toward opposite sides of the platform, chocks pivotally and slidably mounted between the end portions of the beams, crank arms carried
5 by the shafts, link connections between the arms and chocks, and means cooperating with the arms and connections for locking the chocks against movement when in elevated positions.

10 10. An attachment for cars comprising a chock, stop devices for engagement with

the chock when in one position, and means for lowering the chock to disengage it from said devices and for sliding the chock while in lowered position.

15

In testimony that I claim the foregoing as my own, I have hereto affixed my signature in the presence of two witnesses.

JOSEPH A. McCONNELL.

Witnesses:

FRANK J. COUD,
JAMES W. SWEENEY.

PLAINTIFF'S EXHIBIT B

Assignment.

Whereas Joseph A. McConnell, of the city of Dallas, State of Oregon, did obtain Letters patent of the United States numbered 901,815 dated Oct. 20, 1908, for improvements in Chock Attachment for Cars

And Whereas Clayton T. Eaid of City of Portland, State of Oregon, is desirous of acquiring an interest in the same:

NOW THEREFORE to all whom it may concern, be it known that, for and in consideration of the sum of \$1.00) one dollar to me in hand paid, the receipt of which is hereby acknowledged, and other valuable considerations, have sold, assigned and transferred and by these presents do sell, assign and transfer unto the said Clayton T. Eaid, of Portland, Ore., a ($\frac{1}{4}$) one fourth interest in and to the said invention, and letters patent, for, to and in the United States and all its territories, and for, to and in no other place or places; the same to be held and enjoyed by the said assignee within and throughout the above specified territory, but not elsewhere, for the life of the patent for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are or may be granted.

76 *Clayton T. Eaid and Joseph A. McConnell*

Signed at the City of Dallas, County of Polk, State
of Oregon, this 28th day of June A D. 1913.

JOSEPH A. McCONNELL (L. S.)

Signed in the presence of

OSCAR HAYTER

RALPH MILLER.

Plaintiff's Exhibit "D"

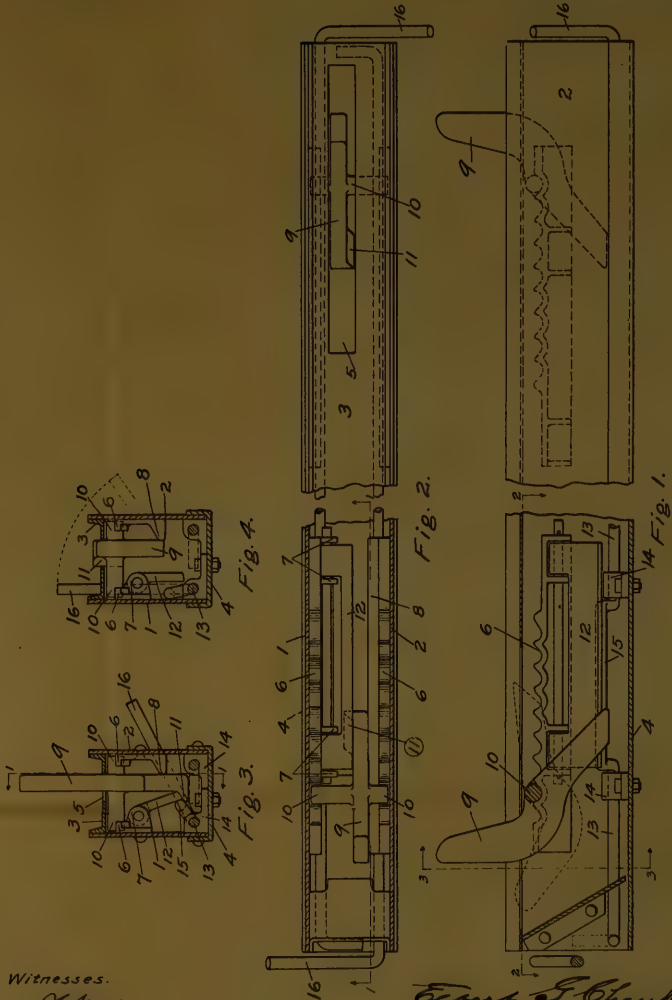
PLAINTIFF'S EXHIBIT "D"

of 76

E. G. CHANDLER.
LOG BUNK.
APPLICATION FILED MAR. 7, 1913.

1,066,795.

Patented July 8, 1913.



Witnesses.

J. Strong
W. Strong

E. G. Chandler
Inventor,
By *A. J. Rosenberg* Att'y.

UNITED STATES PATENT OFFICE.

ELBERT G. CHANDLER, OF PORTLAND, OREGON.

LOG-BUNK.

1,066,795.

Specification of Letters Patent. Patented July 8, 1913.

Application filed March 7, 1913. Serial No. 752,687.

To all whom it may concern:

Be it known that I, ELBERT G. CHANDLER, a citizen of the United States, residing in the city of Portland, county of Multnomah, and State of Oregon, have invented certain new and useful Improvements in Log-Bunks, of which the following is a specification.

My invention relates to log bunks, and more particularly to a bunk such as is mounted upon a flat car, truck, or other vehicle, to receive and hold logs or other objects which are capable of rolling or being otherwise accidentally misplaced during the transportation thereof.

Among the salient objects of my invention are,—to provide an improved bunk of the character referred to having holding chocks adapted to move down into the body of the bunk and below the uppermost supporting surface thereof, when released, whereby to permit the object held to be unloaded; to provide in a bunk of the character referred to, improved mechanism whereby the holding chocks can be released from the opposite side thereof, whereby to avoid the danger incident to releasing or tripping said chocks at the side of the car from which the load is to be discharged; to provide in a bunk of the character referred to improved mechanism for adjusting the holding chocks to different holding positions, whereby they can be readily and quickly adjusted without the necessity of releasing hooks, bolts, or other fastenings; to provide in a bunk of the character referred to improved mechanism for holding the chocks in operative positions and for tripping or releasing the same whereby to permit them to move down into the body of the bunk and thereby release the log or other object; and, in general, to provide an improved, simplified and practical bunk of the character referred to which can be manufactured and put upon the market at a minimum expense.

In order that others may understand my invention, I have shown in the accompanying sheet of drawings, one practical embodiment thereof, which I will now describe.

Figure 1 shows a side elevation of a bunk embodying my invention, with a part broken out to reduce the size of the figure, and with a part in longitudinal section to show the inner construction and arrangement thereof; Fig. 2 is a similar top plan view

with a portion of the top removed, and as if taken on line 2—2 of Fig. 1; Fig. 3 is a cross sectional view taken on line 3—3 of Fig. 1; and Fig. 4 is a view on the same line with the tripping mechanism released and the holding chock down in the body of the bunk.

Referring now to the drawings, the body of the bunk is preferably square or rectangular in cross section and is of such length as is best adapted for the car or other vehicle upon which it is to be used. The body can be made in a variety of ways, but as here shown, it is made of two heavy sheet metal side pieces 1 and 2, with a channel iron top 3, and a bottom plate 4, having upturned edges between which the side pieces 1 and 2 are placed and to which they are riveted. The top plate 2, at each end, is provided with a suitable slot or longitudinally extending opening, as 5, for a purpose hereinafter again referred to.

Secured to the inside of the side pieces 1 and 2, at each end of the bunk and opposite each other, are bracket members 6—6, having corrugated or notched upper edges, one member of each pair being provided with two pairs of hinge lugs, as 7—7, and the other member of each pair being provided with a flange-like portion, as 8, for a purpose hereinafter referred to.

A chock 9, having trunnions 10, substantially of the form shown in side elevation, Fig. 1, and top plan view, Fig. 2, is movably and changeably mounted through the opening or slot 5, in the notches of the bracket members 6—6, the upper end of said chock 9 being adapted to project above the top or supporting surface of the bunk for holding the logs or other objects placed thereupon, and the lower end thereof being provided with a lip or flange portion, as 11, for a purpose now to be described, it being understood, of course, that there is a chock at each end of the bunk.

Hingedly mounted between the hinge lugs 7—7, upon one of each pair of brackets 6—6, is a swinging plate or member 12, the lower edge of which is slightly beveled, as indicated in Figs. 3 and 4, this swinging member being adapted to be moved outwardly, as indicated in Fig. 3, to engage the lip or flange 11, upon the outer end of the chock 9, which lip or flange, it will be noted, is also beveled, and adapted to have a flat engagement with the edge of the swinging

member 12. It is to be noted also that the angle of engagement between the end of the swinging member 12 and the lip or flange 11 of the chock is such, relative to the horizontal component of the pressure between the two surfaces, as to overcome the friction therebetween, so that when the swinging member 12 is released by the movement of the operating rod hereafter referred to, the strain on the chock 9 which causes its lower end to rise, forces the swinging member laterally to the position shown in Fig. 4 and thereby allows the chock to rock on its pivot bearing. The lip or flange portion 8 on the opposite bracket, serves as a bearing against which the opposite side of the chock 9 bears and by means of which said chock is prevented from being moved laterally.

The swinging member 12, at opposite ends of the bunk, are moved outwardly by means of operating rods mounted longitudinally of the bunk and in the lower corners thereof, as indicated by the numerals 13—13, said rods being held in suitable bearing blocks 14—14, each of said bearing rods being provided adjacent the swinging member 12—12, with offset portions, as at 15, adapted to move outwardly against said swinging member 12, when said rods are turned, as indicated in Fig. 3. Each of said rods is provided at its operating end, with a long, up-turned portion, as 16, which serves as a lever or handle, and at its opposite end with a shorter bent portion 17, by means of which said rod can be turned, when there is no load, for the purpose of adjusting the chock at that end; that is, it is possible for one man to turn the rod with one hand and hold the chock with the other.

The chocks 9—9, at the opposite ends of the bunk, it will be noted, are positioned toward opposite sides of the bunk. The operating rods are at opposite sides of the bunk, the swinging members 12—12 are supported at opposite sides of the bunk, and the holding lips 11—11 on the down ends of said chocks, face in opposite directions, as can be understood from Fig. 2. The longer operating lever ends 16—16 of the operating rods 13—13 are, therefore, at opposite ends of the bunk, and each forms a part of the rod which operates the holding and releasing mechanism of the chock at the farther end of the bunk from which it is located. Thus, if it is desired to release a chock at one side of the car and to discharge the log or other object from that side of the car, the operator would go to the opposite side of the car and move the long lever or handle 16, which releases the swinging member 12 at the other end of the bunk body, being the opposite side of the car from that on which he is standing, and the chock at that side of the car would be released and allowed to move down into the

bunk body and into a position below the uppermost supporting edges of the bunk body, whereby any log or other object is free to roll off the end of the bunk.

It is intended that when the offset portion 15 of one of the operating rods 13 is turned downwardly so as to move the swinging member 12 outwardly and to hold it there, that said offset portion 15 shall be at such an angle to said swinging member 12 that the latter cannot move back and release the chock until the operating rod is turned. The angular engagement between the end of the swinging member 12 and the lip 11 of the chock 9 is such that when said operating rod is turned, the swinging member 12 is automatically forced back, as shown in Fig. 4.

While I have shown and described but one embodiment of the invention, I am aware that changes can be made therein without departing from the spirit thereof, and I do not, therefore, limit the invention to the particular form here shown for illustrative purposes, except as I may be limited by the hereto appended claims.

I claim:

1. In a log bunk, a body oppositely disposed supporting or bearing seats therein, a holding chock having supporting trunnions adapted to said bearing seats and movable bodily to different pivotal locations on said seats, and a movable part for holding said chock in its up or operative position.

2. In a log bunk, a body oppositely disposed supporting or bearing seats therein, a holding chock pivotally mounted therein and movable bodily to different bearing seats, and a holding member for holding said chock in operative position in any of said locations.

3. In a log bunk, a body provided with series of notches, a holding chock pivotally mounted in said notches and movable bodily to different notches to change its operative location in said body, and a holding member for holding said chock in operative position in said body.

4. In a log bunk, a body, a pivotally mounted holding chock therein and adjustable to different pivotal locations, an operating mechanism, operable from the end of the body of the bunk, for releasing said chock, whereby it can be moved on its pivotal bearing.

5. In a log bunk, a body provided with oppositely disposed supporting or bearing seats, a pivotally mounted holding chock with supporting trunnions adapted to said seats and movable upon its pivot bearing to a position below the supporting surface of said body, and a holding and tripping mechanism operable from the opposite end of the bunk body.

6. In a log bunk of the character referred

to, in combination, a bunk body having oppositely disposed bearing seats, a pivotally mounted holding chock with trunnion like members adapted to move upon its pivot bearing down into said body, said chock being movable bodily to different bearing seats, a movable part adapted to engage and hold said chock in its up or operative position, and an operating member for moving said movable part.

7. In a log bunk of the character referred to, in combination, a bunk body, a pivotally mounted holding chock adapted to move upon its pivot bearing down into said body, said chock being adjustable to different pivotal locations, a movable part adapted to engage and hold said chock in its up or operative position, and an operating member for moving said movable part.

8. In a log bunk, a bunk body provided with series of oppositely disposed supporting notches or seats, a holding chock pivotally mounted therein and adjustable to different locations therein, a movable part for holding said chock in its up or operative position, and operating mechanism for moving said part.

9. In a log bunk, a bunk body provided with series of oppositely disposed supporting notches or seats, a holding chock pivotally mounted therein and adjustable to different locations therein, a movable part for holding said chock in its up or operative position, and operating mechanism for moving said part.

otally mounted therein and adjustable to different locations therein, a movable part for engaging and holding said chock in operative position, and an operating rod extending to the opposite end of said body for moving said part.

10. A log bunk of the character referred to comprising in combination a bunk body of hollow construction with longitudinally extending opening in its upper side; bracket members having corrugated upper edges mounted opposite each other adjacent said opening, a chock member pivotally supported through said opening and upon said bracket members and adjustable to different positions thereon, said chock being adapted to move upon its pivotal mounting down into said bunk body, a movable member adapted to be moved into holding engagement with said chock, and an operating rod for moving said movable member into engagement with said chock, substantially as described.

Signed at Portland, Oregon, this 26th day of February, 1913.

ELBERT G. CHANDLER. [L. S.]

In presence of—

J. C. STRENG,

R. B. FRENCH.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

Plaintiffs Exhibit G.

Supplemental Agreement.

Supplemental agreement entered into this 28th day of March, 1912, by and between C. T. Eaid, of Portland, Oregon, party of the first part, and Twohy Brothers Company a corporation organized under the laws of the State of Oregon, having its principal office in the city of Portland, Oregon, party of the second part, witnesseth:

That, whereas the parties hereto have heretofore, to wit, on the 22nd day of December, 1911, entered into a certain contract for the manufacture and sale of the Eaid Logging Bunk, to be manufactured in pursuance of the United States letters patent covering the same, as procured by the said party of the first part, and

Whereas owing to the fact that there are other bunks on the market presenting a competition in the sale of such equipment and are sold for a less sum than is provided for in contract heretofore entered into between the parties, and in order to meet said competition it will be necessary for the parties hereto to modify said contract in the agreed selling price to consumers, and the said first party has conceded the necessity for making a reduction in the amount of royalty as is hereinafter provided:

Now therefore, it is agreed that the second paragraph, on page 1 of said contract heretofore entered

into between the parties on December 22, 1911, be modified so as to read as follows, to-wit:

“Second. The party of the second part shall sell said Log bunks at such price as it may determine between the minimum price of seventy dollars (\$70.00) per pair and the maximum price of seventy five dollars (\$75.00) per pair, and it shall pay a royalty to the party of the first part upon sales made to actual consumers in orders of less than one hundred pairs of the sum of ten dollars (\$10.00) per pair, and upon orders of more than one hundred pairs a royalty of eight dollars (\$8.00) per pair.”

It is the intention of the parties hereto to not in any way modify, change or alter the terms and conditions of said contract of the 22d day of December, 1911, except as is hereinbefore specifically set forth, and settlements shall be made as is provided in said first named contract.

In witness whereof the parties hereto duly authorized have executed this supplemental agreement in duplicate this 28th day of March, 1912.

TWOHY BROTHERS COMPANY

By John Hamphen. treasurer
C. T. EAID.

Defendants Exhibit 1.

This agreement made and entered into this 22d day of Dec, 1911 by and between C. T. Eaid, of Portland, Oregon, party of the first part and Twohy Brothers Company, a corporation organized under the laws of the State of Oregon, having its principal office in the city of Portland, Oregon, party of the second part, witnesseth

That whereas the party of the first part has secured United States lettres patent covering a certain device known as the Eaid Log Bunk, or Eaid Logging Bunk, and is desirous of making arrangements with the party of the second part to make and sell the same

Now therefore, to that end it is agreed between the parties hereto as follows:

First, the party of the second part shall manufacture and place upon the market said patented device in such place and in such manner as it may determine best to bring about the greatest number of sales of same, and it will guarantee the purchaser thereof against defective workmanship and material, and that it will vigorously and in good faith prosecute the manufacture and sale of said bunks, commencing on the 1st day of March, 1912, and continuing thereafter during the life of this contract, or until the same is terminated in the manner hereinafter provided for.

Second, The party of the second part shall sell said Log Bunks at such price as it may determine between the minimum price of eighty five (\$85.00) per pair and the maximum price of one hundred (\$100.00) Dollars per pair, and it shall pay a royalty upon each sale to the party of the first part of 40% of the difference between the cost of manufacture and the selling price, and for the purpose of definitely fixing the amount of this royalty it is stipulated and agreed that the cost of manufacture of said bunks is sixty (\$60.) Dollars per pair, and that the average selling price is to be ninety five dollars per pair, and that the royalty or compensation too the party of the first part upon sales as aforesaid is therefore determined to be fourteen (\$14.) Dollars per pair, or seven (\$7.00) Dollars per bunk.

Third, The party of the first part undertakes and agrees that the party of the second part shall have the full and exclusive right of manufacture and sale of said bunks, of which he is the patentee, as aforesaid, during the life of said patent, in all parts of the United States, and in all other countries where said invention may be patented, or where the same may be introduced during the life of said patent, and this exclusive right and protection attaches not only to the said device in its present condition and state of perfection, but it obtains and shall attach and be enjoyed by the party of the second part to all improvements, modifications and changes which may be made or accomplished by said party of the first part, or through his instrumentality during the life

of said patent, provided that the terms of this agreement shall be carried out and complied with by the party of the second part as herein stipulated.

Fourth. The party of the first part undertakes and agrees to protect and defend said patented device against all infringements, suits or actions arising or which may arise during the life of this contract, and undertakes to and does hold the party of the second part harmless from any actions, suits or proceeding that may arise or be brought by any party or parties whomsoever, wherein the exclusive right of the party of the first part as patentee of said device, or of any invention that he may make in connection therewith is challenged or contested; that the party of the first part agrees to turn over to the party of the second part all data that is or may come into his possession which may in any way assist the party of the second part in manufacturing advertising or selling said device.

Fifth. It is the intention, and it is understood and agreed that after the expiration of three years from the date hereof the said Eaid shall have the right to terminate and cancel this contract, provided he shall not have realized in pursuance of the terms of this contract, an amount equal to \$3000 as his share of the proceeds of the sale of said bunks; and in case said right is exercised Twohy Brothers Company shall promptly dispose of all bunks in stock at the time of said cancellation upon the terms herein provided. The contract shall thereupon be declared

null and void, and both parties released therefrom, after a settlement shall have been made between them on all business done under this contract.

Sixth. The party of the first part shall be promptly paid from time to time as said bunks are sold and collections made upon said sales, and the party of the second part shall make a report to the party of the first part within twelve months from the date of such sales, at which time a settlement shall be made between the parties as provided in the second paragraph herein, and the party of the first part shall have access at all reasonable times to the books of the party of the second part pertaining to the business transacted under this contract, for the purpose of verifying statements and reports by the party of the second part of collections made.

Seventh: As said bunks are manufactured they shall bear the serial date and be numbered consecutively beginning with number one. Quarterly statements shall be given in writing to said party of the first part of the progress of said manufacture and sale of said bunks, and said statements shall report in detail the consignee, vendee, terms of sale, payments, and any and all information that properly relates to the manufacture and sale of said device.

Eighth. It is agreed that the party of the second part shall not dispose of or assign this contract, or any of the rights thereunder, or any of its rights to said Eaid Log Bunk or any of its rights in the man-

ufacture or sale thereof, without the written consent of the party of the first part.

In witness whereof the parties hereto duly authorized have executed this agreement in duplicate this 22nd day of Dec., 1911.

TWOHY BROTHERS COMPANY

By JOHN HAMPSHIRE treasurer
C. T. EAID.

Defendant's Exhibit 2

DEFENDANT'S EXHIBIT 2.

C. T. EAID.

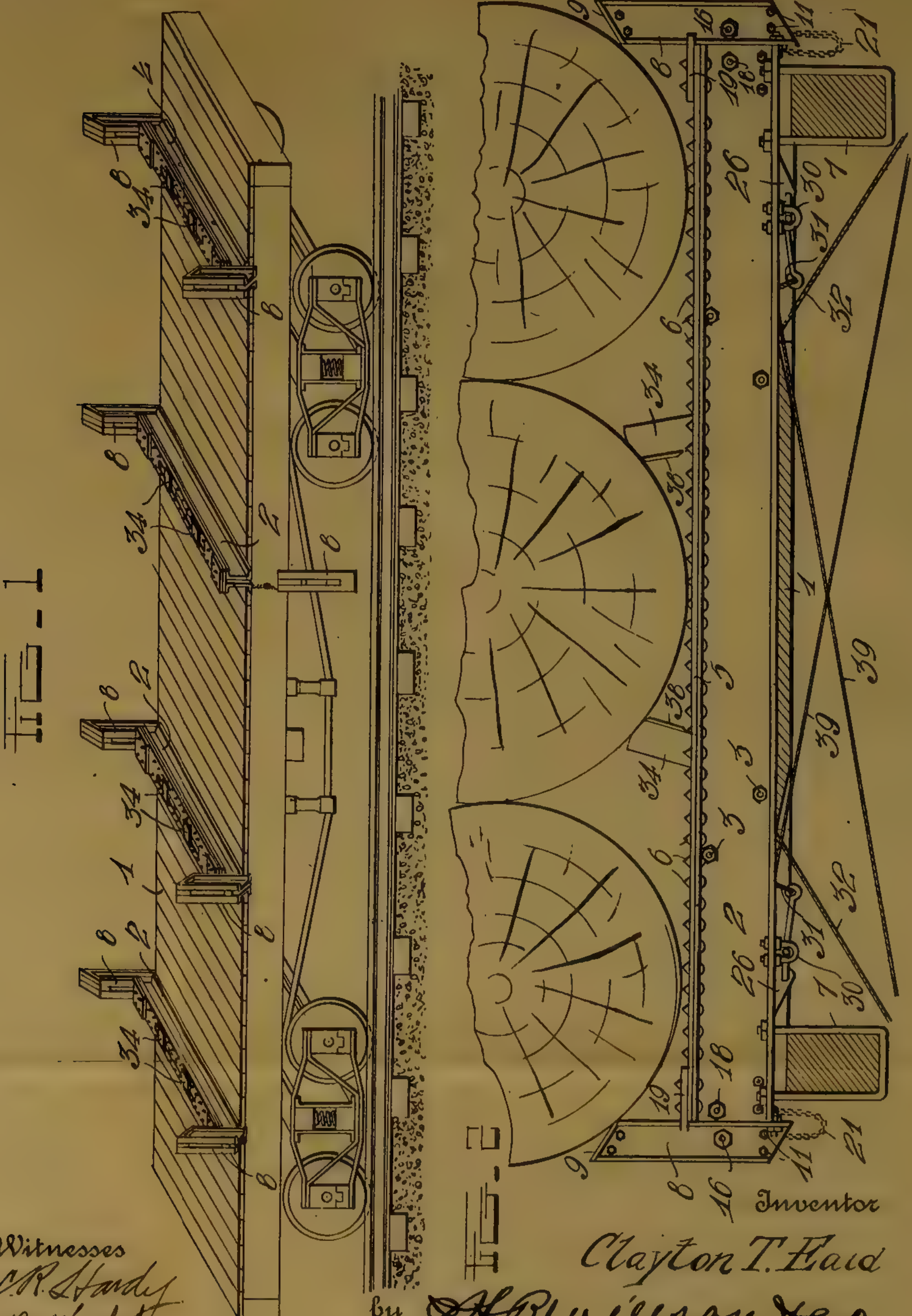
LOG BUNK AND STAKE FOR RAILWAY CARS.

APPLICATION FILED DEC. 29, 1910. RENEWED APR. 26, 1912.

1,050,929.

Patented Jan. 21, 1913.

3 SHEETS—SHEET 1.



Witnesses
C. R. Hardy
O. B. Hopkins

by *A. B. Wilson & Co.*
Attorneys

Inventor
Clayton T. Eaid

C. T. EALD.

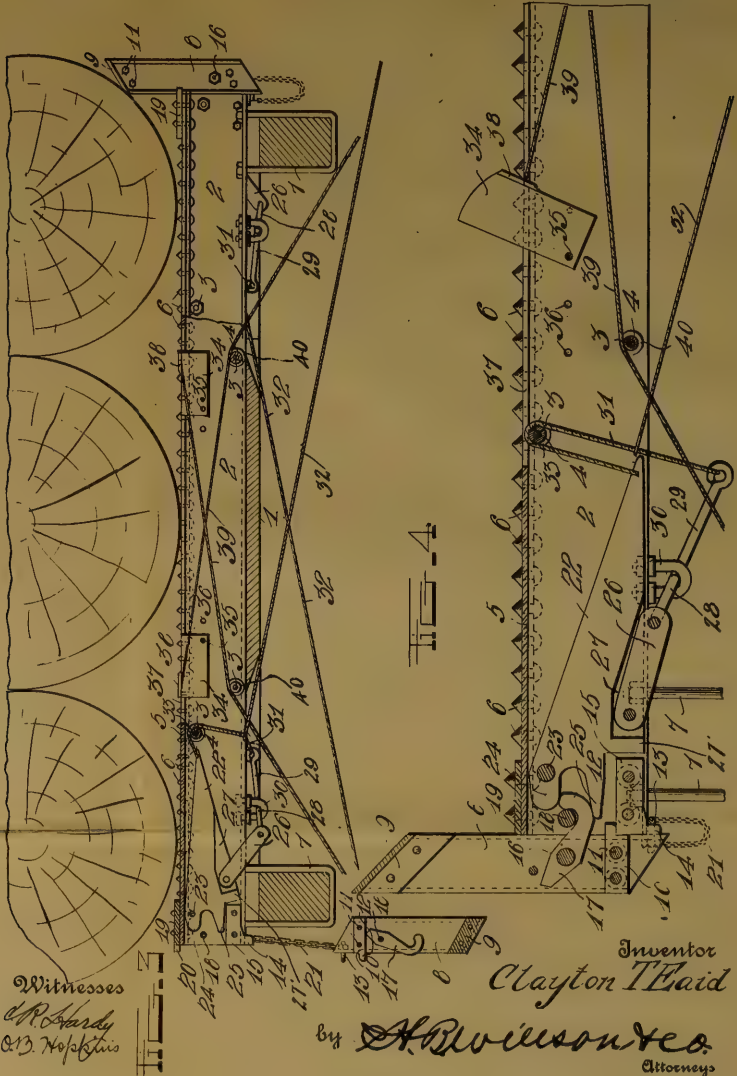
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3 SHEETS-SHEET 2.



Witnesses
W. R. Hardy
B. B. Hopkins

By *H. B. Wilson & Co.*
 Attorneys

C. T. EAID.

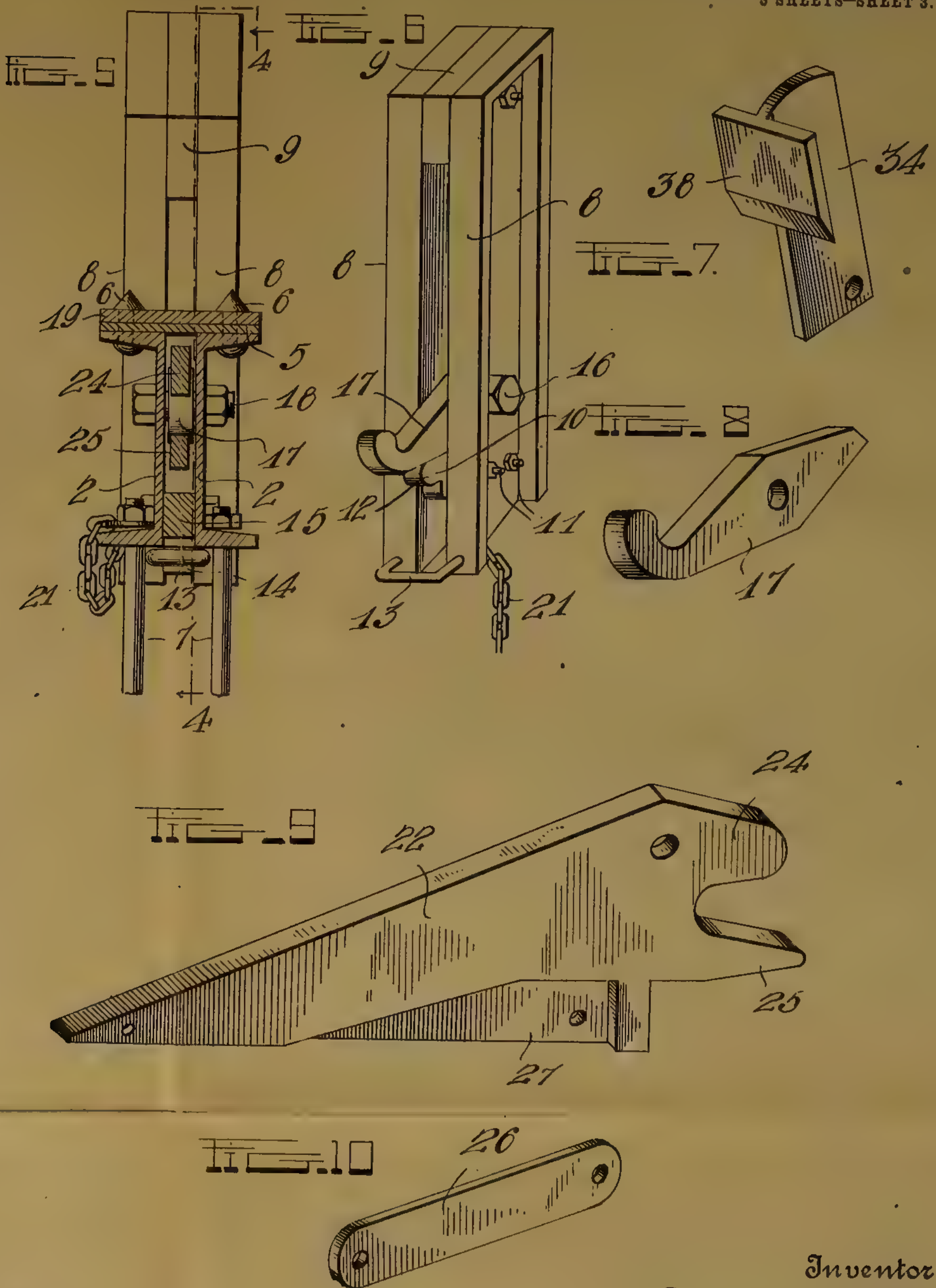
LOG BUNK AND STAKE FOR RAILWAY CARS.

APPLICATION FILED DEC. 29, 1910. RENEWED APR. 25, 1912.

1,050,929.

Patented Jan. 21, 1913.

3 SHEETS—SHEET 3.



Witnesses
C. R. Hanks
D. B. Hefkins

Inventor
Clayton T. Eaid
by *A. B. Wilson & Co.*
Attorneys

UNITED STATES PATENT OFFICE.

CLAYTON T. EAID, OF PORTLAND, OREGON.

LOG-BUNK AND STAKE FOR RAILWAY-CARS.

1,050,929.

Specification of Letters Patent.

Patented Jan. 21, 1913.

Application filed December 29, 1910, Serial No. 599,830. Renewed April 25, 1912. Serial No. 693,194.

To all whom it may concern:

Be it known that I, CLAYTON T. EAID, a citizen of the United States, residing at Portland, in the county of Multnomah and State of Oregon, have invented certain new and useful Improvements in Log-Bunks and Stakes for Railway-Cars; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to improvements in log bunk and stakes for railway cars.

One object of the invention is to provide a log bunk having an improved construction of stake and means whereby the same may be released from either side of the car thus preventing danger of the log rolling out onto and injuring the operator when the stakes are removed.

Another object is to provide a log bunk having arranged therein chock blocks adapted to be operated from either side of the car.

With these and other objects in view, the invention consists of certain novel features of construction, combination and arrangement of parts as will be more fully described and particularly pointed out in the appended claims.

In the accompanying drawings: Figure 1 is a perspective view of a flat car showing my invention applied thereto; Fig. 2 is an enlarged vertical cross section of the car showing one of the bunk beams and the stakes and chock blocks therein in operative position; Fig. 3 is a similar view showing the stakes and blocks in inoperative positions; Fig. 4 is an enlarged vertical longitudinal sectional view through one end of one of the beams showing the parts in operative position, the plane of the section being indicated by line 4-4 of Fig. 5; Fig. 5 is a vertical cross section of one of the beams; Fig. 6 is a perspective view of one of the stakes; Fig. 7 is a similar view of one of the chock blocks; Fig. 8 is a similar view of one of the stake holding hooks; Fig. 9 is a similar view of one of the stake holding levers of the beams; Fig. 10 is a similar view of one of the lever locking links.

Referring more particularly to the drawing, 1 denotes a flat car which may be of any suitable construction and on which are arranged at suitable intervals these improved log bunks 2 of which there may be any desired number. The bunks 2 are preferably

formed of channel iron bars which are bolted together by a series of fastening bolts 3 and are spaced a suitable distance apart by sleeves 4 arranged on the bolts between the bars as shown. To the flanges of the upper edges of the bars are secured connecting plates 5, said plates being bolted to the flanges of the bars by bolts 6 having cone shaped or pointed heads which engage the logs on the bunks and prevent the same from shifting longitudinally. The beams or bars forming the bunks 2 are preferably secured to the car by means of U-shaped bolts or attaching bars 7 which are passed around the side sills of the car frame and have their threaded upper ends projecting through apertures formed in the lower flanges of the beams, said threaded upper ends having screwed thereon clamping nuts whereby the beams are clamped down into tight engagement with the floor of the car.

In connection with my improved bunks I provide log holding stakes 8 which are adapted to be engaged with and secured to the opposite ends of the beams forming the bunks 2 and which are preferably formed of two channel iron bars of suitable length and which have their upper and lower edges beveled or formed at an angle as shown. The bars forming the stakes 8 are spaced apart at their upper ends by T-shaped cap plates 9 the upper portion of which covers the upper ends of the bars forming the stake and forms a finish for the latter. Through the bars and the downwardly projecting portion of the spacing plates 9 is inserted a clamping bolt by means of which the bars of the stake are secured together in spaced relation. The lower ends of the bars are spaced apart by spacing blocks 10 through which and through the adjacent portions of the bars are arranged clamping bolts 11 whereby said lower ends of the bars are secured together in spaced relation. Each spacing block 10 has formed on one end a lug 12 which projects beyond the inner edges of the bars for a purpose hereinafter described.

On the inner side of each stake near its lower end is secured a horizontally disposed laterally projecting loop bolt 13 the free ends of which are engaged with apertures formed in the inner flanges of the bars forming the stake and are secured by nuts as shown. The loop end of each bolt 13 is adapted to be engaged with a downwardly

projecting lug 14 formed on a spacing block 15 arranged between the beams of the bunks and secured thereto by suitable fastening bolts. The outer end of the spacing blocks 15 are adapted to be engaged by the lugs 12 on the spacing blocks 10 of the stakes when the latter are engaged with the opposite ends of the bunk beams, said lugs and blocks thus forming a support for the stakes the lower ends of which are firmly bound to the ends of the beams by the loops 13.

Arranged through the beams of the stakes 8 near their lower ends are transversely disposed bolts 16 on which are pivotally mounted the inner ends of stake holding hooks 17 the outer ends of which are adapted to project into the space between the outer ends of the bunk beams and into engagement with fastening bolts 18 which are arranged through the beams as shown in Fig. 4. On the top plate of the beams of the bunks at their opposite ends are secured stake bracing plates 19 having on their outer ends lugs 20 which engage the opposite sides of the stakes and firmly hold the same against lateral or sidewise movement. To one end of one of the beams of the bunks is secured one end of a stake holding chain 21 the other end of which is secured to the stake thereby preventing the same from becoming lost or mislaid when disconnected or removed from the end of the bunk beams.

In order to provide for the engagement of the stake fastening hook 17 with the fastening pins 18 in the ends of the bunk beams and to effect the disengagement of said hooks from the bolts for the purpose of releasing the stakes I provide a hook operating lever 22 which is pivotally connected at its outer upper end with a supporting bolt 23 arranged through the bunk beams as shown. The lever 22 is pivotally mounted on the bolt 23 between the beams of the bunks and on the outer end of said lever is formed an outwardly projecting hook releasing lug or nose 24 below which and spaced a suitable distance therefrom is formed a hook guiding and supporting lug 25 which, when the lever 22 is in its normal position engages the under side of the inner end of the hook 17 and holds the same into operative engagement with the bolt 18 (see Fig. 4.) In order to hold the levers 22 in their normal position and thus prevent the casual disengagement of the hooks 17 from the pins 18 in the opposite ends of the bunk beams I provide suitable lever locking devices which are in the form of links 26, one end of which is pivotally connected to downwardly projecting extensions 27 formed on the under side of the levers 22 and which are pivotally connected at their outer ends to cranks 28 of link operating levers 29 which are pivotally mounted in suitable bearings 30 arranged on the under sides of

the beams as shown. The inner ends of the levers 22 and levers 29 are connected together by cables 31 to which are connected operating cables 32 leading to the opposite sides of the car. When the pull is exerted on the cables 31 and 32 the free ends of the levers 22 and 29 will be swung upwardly thereby rocking the crank 28 of said lever 29 and swinging the end of the link 26 connected with said crank 28 downwardly which will exert a downward and inward pull on the outer end of the lever 22. When the inner end of the lever 22 is thus swung upwardly the supporting lug 25 thereof will be swung downwardly and inwardly thereby removing said lug from the path of the hook of the member 17 and the hook releasing nose or lug 24 of said lever 22 will push the hook 17 down out of engagement with the bolt 18, thereby releasing the stake which will drop out of engagement with the end of the bunk beams. The cables 31 which are connected to the inner ends of the levers 22 and to levers 29 pass upwardly over guide pulleys or sleeves 33 arranged between the beams of the bunks adjacent to and above the inner ends of the levers 22 as shown.

When it is desired to replace a stake at either end of one of the bunk beams the loop bolt 13 on the lower end of the stake is engaged with the lug 14 on the spacing block at the adjacent end of the beam and the stake is swung inwardly whereupon the supporting lug 12 of the spacing block 10 will engage the upper side of the block 15 in the beam. The cables 31 and 32 are pulled to swing the inner end of the lever 22 upwardly and the lug 25 on the outer end thereof downwardly or away from the bolt 18 to permit the inner end of the hook to enter between the lug 25 and the bolt whereupon when the cables 31 and 32 are released the inner end of the lever 22 will drop by gravity thus causing the lug 25 to force the inner end of the hook up into engagement with the pin 18 thereby securely fastening the stake to the ends of the bunk beams. When the cables 31 and 32 are released the free ends of levers 22 and 29 will swing downwardly by gravity which will cause the crank 28 of lever 29 to move upwardly carrying with it the end of the link 26 connected thereto, thereby forcing the other end outward and when the free end of the lever 29 is forced downward by the operator until the crank 28 passes the center of the fulcrum of said crank 28, the latter will engage the lower faces of the bunk beams and the parts will be automatically locked in the position shown in Fig. 4. It will be noted that this locking is effected by the passing of the crank 28 above the plane passing through the fulcrum of the lever 29 and the pivot connecting the link 26 to the lever 22.

When the parts are thus locked it will be seen that the hook 17 will be held against casual disengagement from the bolt or keeper 18. The operator may obtain access 5 to the lever 29 to lock the parts by going under the car if necessary.

In addition to the stakes 8 I also provide said bunk beams with chock blocks 34 in the form of plates having their lower ends pivotally mounted between the beams of the bunks by means of pivot bolts 35 which are adapted to be engaged with a series of alined pivot holes 36 arranged in the beams of the bunks as shown. The chock blocks 34 are 15 pivotally connected at their lower outer corners with the bolts 35 and project upwardly through slots 37 formed in the connecting plates 5 of the beams. The upwardly projecting ends of the plates of the chock blocks have formed on their inner edges flanged log engaging surfaces 38 and preferably have their upper ends rounded or formed at a slight angle as shown. By thus pivotally connecting the chock blocks 25 between the beams of the bunks, said blocks may be swung upwardly to operative positions or downwardly to inoperative positions between the beams. When swung upwardly to operative positions the inner 30 edges of the flanges 38 on the inner sides of the blocks engage the upper side of the plate 5 of the beams and thus limit the inward movement of the blocks. When the blocks are swung downwardly to an inoperative position the downward movement of the same is limited by the engagement of the flanges 38 with the upper surface of the beams. The blocks are swung upwardly and held in operative position against the pressure of the logs by operating cables 39 40 which are connected to the inner edges of the blocks and pass between the beams of the bunks and over suitable guide rollers 40 to the opposite sides of the car whereby 45 the blocks on either side of the log may be released from the opposite side of the car and the log thus permitted to roll off the latter without danger of injuring the operator.

50 From the foregoing description taken in connection with the accompanying drawings, the construction and operation of the invention will be readily understood without requiring a more extended explanation.

55 Various changes in the form, proportion and the minor details of construction may be resorted to without departing from the principle or sacrificing any of the advantages of the invention as defined in the appended 60 claims.

Having thus described my invention what I claim is:

1. A log bunk for cars comprising beams, means to fasten said beams to the bottom 65 of the car, stakes arranged on the opposite

ends of the beams, fastening hooks carried by said stakes, hook-engaging means on said beams for engagement by said hooks whereby said stakes are removably secured to the ends of the beams, hook releasing levers arranged between said beams, means on said levers to hold said hooks in engagement with said hook-engaging means, means on said levers to disengage the hooks thereby releasing the stakes, means to hold said levers in operative engagement with the hooks whereby the latter are prevented from being casually disengaged from said hook-engaging means on the beams, and means whereby the levers are operated from opposite sides of the car to release the stakes.

2. A log bunk for cars comprising transversely disposed beams, means to secure said beams to the car, stakes arranged on the opposite ends of the beams, means to secure said stakes in detachable engagement with the ends of the beams, means whereby the stakes on the ends of the beams at one side of the car may be released from the opposite side thereof, chock blocks arranged on said beams on opposite sides of the center thereof and means whereby said chock blocks may be operated from the opposite sides of the car.

3. A log bunk for cars comprising pairs of transversely disposed beams secured together in spaced relation, means to fasten said beams to the bottom of the car, stakes arranged on the opposite ends of the beams, stake attaching bolts arranged in said beams, fastening hooks secured to said stakes and adapted to be engaged with said bolts whereby said stakes are removably secured to the ends of the beams, hook releasing levers arranged between said beams, means on the outer ends of said levers to hold said hooks into engagement with said fastening bolts and means to disengage the hooks from the bolts thereby releasing the stakes, means to hold said levers in operative engagement with the hooks whereby the latter are prevented from being casually disengaged from the bolts in the ends of the beams and means whereby the levers are operated from opposite sides of the car to release the stakes.

4. A log bunk for cars comprising pairs of transversely disposed beams secured in spaced relation, longitudinally slotted connecting plates arranged on the upper sides of the beams, bolts to secure said plates to the beams, said bolts having conical or pointed heads which project above the upper side of the plates, spacing and stake supporting blocks arranged between the beams at their opposite ends and adjacent to their lower edges, lugs formed on said blocks and projecting below the lower edges of the beams, stake holding plates secured to the outer ends of said connecting plates, said 130

stake holding plates having formed on their outer ends stake engaging lugs, log holding stakes arranged on the opposite ends of said beams, supporting lugs arranged on the lower ends of said stakes and adapted to project between the beams of the bunks and into engagement with the stake supporting blocks therein, looped stake holding bolts secured to the lower ends of the stakes and adapted to be engaged with the lugs on the lower edges of the spacing blocks of said beams, stake holding bolts arranged through the opposite ends of the beams, stake holding hooks pivotally connected to the stakes and adapted to be inserted between the opposite ends of the beams and into operative engagement with said bolts whereby the stakes are removably held in position, and means to release said hooks and thereby disengage the stakes from the ends of the beams.

5. A log bunk for cars comprising pairs of transversely disposed beams, said beams being secured together in spaced relation, log holding stakes arranged on the opposite ends of said beams, said stakes comprising pairs of bars secured together in spaced relation, combined spacing and finishing plates arranged on the upper ends of said bars, means to detachably support and fasten the lower ends of the stakes to the outer ends of the beams, stake attaching bolts arranged through the opposite ends of the beams, stake fastening hooks pivoted to said stakes and adapted to be engaged with the fastening bolts in the ends of the beams, hook holding and releasing levers pivotally mounted between said beams, hook guiding and supporting lugs formed on the outer ends of said levers and adapted to engage the inner ends of the hooks and to hold the latter in operative engagement with their fastening bolts, hook detaching lugs also formed on the outer ends of said levers and

adapted to disengage the hooks from their bolts when said levers are operated, cranked locking levers pivotally mounted on the under side of said beams, links to connect said cranks with said hook holding and releasing levers whereby the latter are locked in operative position to hold said hooks in engagement with the bolts, operating cables connected to the ends of said levers whereby the latter are simultaneously operated from the opposite side of the car to release said hooks and thereby detach said stakes, and chock blocks having an adjustable and pivotal connection with said beams to hold the logs in position thereon.

6. A log bunk for cars comprising pairs of transversely disposed beams secured together in spaced relation, means to secure said beams to the car, longitudinally slotted connecting plates secured to the upper edges of said beams, log holding stakes arranged on the opposite ends thereof, means to detachably secure said stakes in place whereby the logs may be released from the opposite side of the car, supporting bolts adjustably arranged in said beams, chock blocks pivotally mounted on said bolts and adapted to project up through the slotted connecting plate of the beams, flanges formed on the inner edges of the upwardly projecting portions of said blocks and operating cables connected to the lower ends of the blocks whereby each of said blocks is swung upwardly from the opposite side of the car and held in operative position above the beams.

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

CLAYTON T. EAID.

Witnesses:

J. A. HOSBOR,
R. E. MASON.

1,055,150.

2 SHEETS—SHEET 1.



Defendant's Exhibit 3.

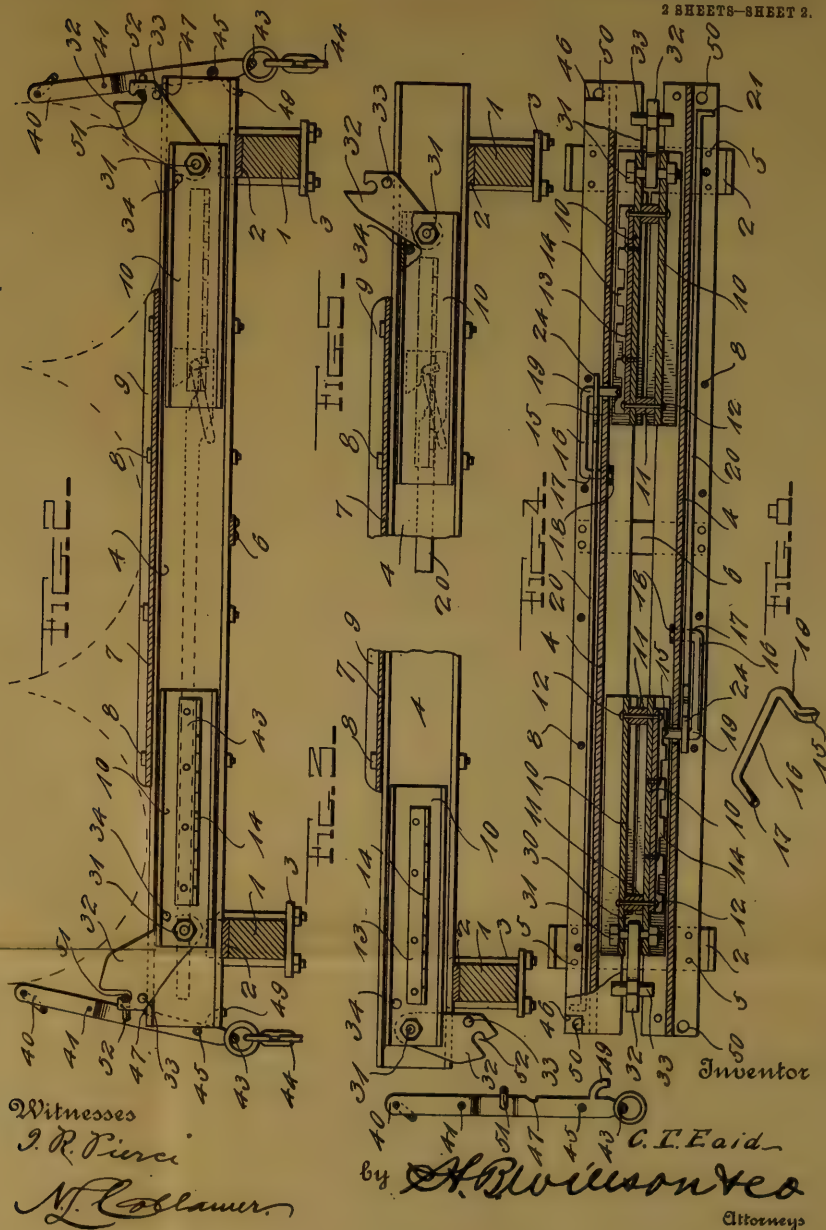
DEFENDANT'S EXHIBIT 3.

C. T. EAD.
 LOGGING CAR BUNK AND STAKE.
 APPLICATION FILED FEB. 12, 1912.

1,055,150.

Patented Mar. 4, 1913.

2 SHEETS-SHEET 2.



UNITED STATES PATENT OFFICE.

CLAYTON T. EAID, OF PORTLAND, OREGON.

LOGGING-CAR BUNK AND STAKE.

1,055,150.

Specification of Letters Patent.

Patented Mar. 4, 1913.

Application filed February 12, 1912. Serial No. 677,008.

To all whom it may concern:

Be it known that I, CLAYTON T. EAID, a citizen of the United States, residing at Portland, in the county of Multnomah and State of Oregon, have invented certain new and useful Improvements in Logging-Car Bunks and Stakes; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to railway rolling stock, and more especially to freight cars adapted for conveying logs; and the object of the same is to produce improved means for holding a load of logs, poles, or lumber and for releasing the same from that side of the car where it will be impossible for the workmen to be injured by the falling of the load so released and dropped. This and other objects are carried out by the construction hereinafter more fully described and claimed, and as shown in the drawings wherein—

Figure 1 is a side elevation of the sill of the car truck, giving an end view of two of my improved bunks and an elevation of two of my improved stakes as used in connection therewith. Fig. 2 is a side elevation of one of my improved bunks with the nearer I-beam removed and the top plate in section, and both stakes engaged by the chock blocks. Fig. 3 is a similar view of one end of the device showing the carriage as having been moved to disengage the chock block from the stake and the latter in the act of falling. Fig. 4 is a plan view of the device with the stake omitted, a considerable portion of the view being in section on a line just beneath the upper flanges of the carriages. Fig. 5 is a view similar to the right end of Fig. 2 with the stake omitted, the carriage having been adjusted farther inward along the I-beams than in Fig. 3. Figs. 6 and 7 are enlarged details showing the latching mechanism with the cam in two different positions as will be referred to hereinafter. Fig. 8 is a perspective detail of the latch. Fig. 9 is a perspective detail of one of the stakes and of so much of the other parts as it engages when it is locked in substantially upright position.

In the drawings the numeral 1 designates part of the platform of a car or other vehicle such as is used for transporting logs, poles, lumber and possibly other freight of

similar shape, although this invention is especially applicable to articles which are cylindrical in contour and rather long and which by their shape are therefore likely to roll off the vehicle. If the load should consist, for instance, of three rather large logs as shown in dotted lines in Fig. 2, it may be easily held on the vehicle by the use of chock blocks properly disposed, and as an element of safety it may be additionally held by means of two stakes although the latter are ordinarily used for holding a larger load of articles of rather smaller size. When it is desired to dump the larger logs, it is usually necessary only to remove the chock blocks or stakes or both, and either permit the logs to roll off or to stop them by means of a crow bar. Once started, the load goes with a rush, and operators at that side of the car have not time to escape and therefore are frequently injured or killed. One object of the present invention is to render it impossible for an operator to release the chock block or stake on that side of the car nearest to him, and therefore no matter how careless or forgetful he may be it is impossible for him to unload a log toward himself. This object would be carried out by disposing one of my improved bunks at the midlength of a rather long platform car to engage the center of long logs loaded thereon, leaving their extremities to be chocked by other ordinary means; but when a platform car is provided with this device, there are usually two of them put in place as indicated in Fig. 1, although as they are duplicates of each other I need describe but one.

Upon the sills of the platform 1 bed plates 2 are secured by clips 3 or otherwise, and across each pair of said plates is disposed a pair of spaced I-beams 4 whose lower outer flanges are secured to the bed plates by screws or rivets 5 as shown. At suitable points throughout their length these beams 4 may also be connected by transverse straps or plates 6 passing beneath them and secured to their lower flanges as shown in Figs. 2 and 4; and they are further held in spaced relation to each other by means of a plate 7 extending over their upper flanges and bolted thereto as at 8, this plate being of some considerable length as shown in Fig. 2 and having upstanding flanges 9 along its edges so as to slightly indent the log or logs laid thereon

as indicated in dotted lines and prevent the same from moving longitudinally upon the car body. The parallel spaced I-beams 4 are thus rigidly mounted across the sills of a car or other vehicle, their upper flanges and the flanges 9 of the plates 7 constitute supports for the load, and the space between the beams constitutes a runway or track for the carriage next to be described. There are two such carriages for each runway, one disposed at each end of the latter, and each carriage is made up of a pair of I-beams 10 all dimensions of which are smaller than those of the I-beams 4, the webs of said beams 10 being spaced by blocks 11 through which pass fastening bolts 12 as best seen in Fig. 4. Outside the web of one beam (for instance, the right-hand one of the pair) is disposed an L-shaped plate 13 having a rack bar 14 on its outwardly extending flange, and engaging this rack bar is the lip 15 at one extremity of a U-shaped latch 16 whose body lies outside the web of the adjacent beam 4 and whose opposite extremity 17 is inturned through said web and headed up as at 18 to form a pivot. The arm 19 carrying the lip 15 moves in a slot 20' cut on an arc around the pivotal end 17 of this latch through the web of the beam 4 as best seen in Figs. 6 and 7, and the lip 15 depends from the inner end of the arm 19 and is adapted to engage the notches in the rack bar 14 in a manner which will be clear. The means for actuating this latch consist of a push bar or rod 20 slidably mounted behind the bolts 8 above described and behind the screws or bolts 5 by which the beam 4 is attached to one of the plates 2, and the handle 21 of the rod stands at the remote end of the track or runway from the position occupied by the carriage being described, for a purpose which will appear below. The inner end of the rod is formed into a hook whose shank has a cam 23 underlying the movable arm 19 of the latch and whose bill forms a guard 24 overlying said arm as best seen in Figs. 6 and 7. From this construction it is obvious that when the rod is manipulated by its handle 21 the cam 23 may be forced under said arm 19 to raise the latch to the position shown in Fig. 7 so that its lip 15 disengages the rack bar 14, but when the rod is moved in the opposite direction the arm rides down the cam and the guard 24 moves over the arm so that the lip reengages the rack bar 14 and the guard prevents it from accidental disengagement therewith. As seen in Fig. 4, the carriage at each end of the track or runway is locked and unlocked by a latch controlled by a rod whose handle stands at the opposite side of the car, the purpose of which will be explained below. At the outer extremities of both I-beams

10 all their inner flanges are cut away as shown at 30, and between their webs on a bolt 31 is pivoted a chock block 32 whose thickness is such that it may move freely between the inner edges of the flanges of the I-beams 4. When idle this block hangs as seen in Fig. 3, and through its body passes a pin 33 whose extremities rest on the inner flanges of the main beams 4 when the chock block is raised as seen in Fig. 2 and may even slide inward thereon to a considerable extent when the carriage must be adjusted inward as seen in Fig. 5 to bring the chock block under a somewhat smaller load. A pin 34 is properly disposed through the webs of the two beams 10 to prevent this block from rising higher than shown in Figs. 2 and 5, and as its center of gravity is therefore always outside of its pivotal bolt 31 it follows that when the carriage is moved outward and the pin 33 passes off the extremities of the flanges of the main beams 4 the chock block will fall and the pin will pass around the ends of said beams to the position shown in Fig. 3. The device as thus far constructed is quite useful for supporting a load of logs or rather large cylindrical articles upon the bunk in such manner that they cannot roll off of the same. They are obviously disposed as indicated by the dotted lines in Fig. 2, the carriages being moved inward sufficiently to cause the chock blocks to rest beneath the outermost logs in a manner which will be clear. When now it is desired to dump the load the chock block at one side of the car must be permitted to assume the position shown in Fig. 3; and, as explained above, the carriage can only be unlatched to permit the freeing of this chock block by an operator who must of necessity stand at the opposite side of the car and is therefore free from danger of injury by the falling logs.

In connection with the improvements above described I use a stake of peculiar construction in order that it will cooperate with the chock block and the mechanism for locking and unlocking the same. The upper end of body of this stake 40, may be of any height and construction, but by preference it is composed of two pieces of strap iron riveted together as shown at 41, and at their lower ends they diverge into a loop 42 beneath which the irons are integrally connected in a bail 43 which may be and by preference is flexibly connected with the platform or sill 1 by means of a chain 44 so that the stake may not be lost. The loop is of sufficient width to span the web of the two main beams 4, it is provided with a cross bar 45 adapted to rest against the ends of said webs, beneath this bar the inner edges of the sides of said loop rest against the outer flanges of said beams, and the

upper outer flanges are cut away or notched as at 46 so that the entire stake may occupy an oblique position as best seen in Fig. 2. By preference the inner edges of the side bars of the loop are themselves notched as seen at 47 so that when each stake occupies this position there is an interengagement of notches as best seen in Fig. 9, and if the notches 47 are employed their engagement with the extremities of the outer flanges of the main beams 4 will prevent the stake from moving upward or downward or inward at this point, and the fact that the body of the loop surrounds the webs of said main beams will prevent it from moving transversely thereon. In order now to prevent the lower end of the stake from being moved outward, I provide the side bars of said loop with downwardly projecting hooks 49 engaging eyes 50 in the outer lower flanges of said main beams; and as the stake cannot rise for the reason just described, the hooks cannot disengage the eyes. Finally, in order to prevent the upper ends of the hooks from moving outward, I provide each loop with a deflected cross bar which is in effect an eye 51 properly disposed to be engaged by a hook 52 in the chock block 32 when the latter is elevated as seen in Fig. 2. Thus it will be seen that a stake of this specific construction is particularly applicable to a chock block of the construction described, especially when the latter is controlled by a carriage which is locked and unlocked as has been set forth.

Assuming that the stake is locked in upright position as shown at the left of Fig. 2. When it is desired to release the load whether the same be logs as indicated or smaller articles, an operator (who of necessity must be at the opposite side of the car) pushes inward on the handle 22 whereby the cam 23 is forced beneath the arm 19 of the latch 16 and the lip 15 thereof is raised out of engagement with the rack bar 14. This frees the carriage which is at liberty to move outward or to the left in Fig. 2 and to the position shown in Fig. 3, and with it moves the chock block 32. The pin 33 on the latter slides along the upper flanges of the main beams 4 until it clears their outer corners and may fall over the same as described, and meanwhile the hook 52 carries the eye 51 along with it and swings the stake outward so that the notches 47 and 46 disengage each other, and the hooks 49 are disengaged from the eyes 50 and the stake is disconnected from the main beam just at the time that the chock block commences to swing downward around its pivot 31. As it falls to the position shown in Fig. 3 its hook 52 disengages the eye 51 completely, and the entire stake falls out of the way and is retained merely by the chain 44. Thus the chock block and stake are simul-

taneously and automatically removed from beneath the log near that end of the bunk, and the log rolls off on the ground without the possibility that it may injure the workman who must have actuated the latch from the opposite side of the car. In this position of parts the chock block is entirely out of the way and the stake either hangs pendent by the chain 44 or is entirely removed, and the result is that the car may be used for other purposes.

When now it is desired to again load a car provided with this invention, the parts are set up to the position shown in Fig. 2 and the load must be passed over the upper ends of the stakes. The latter, however, are locked against movement in all directions in the manner described above, and if in the act of loading some of the load should strike the stakes they will not be dislodged from their position. If it should so happen that the load is smaller than the width of the car or the length of the main beams 4, the stakes will be disengaged from the hooks 42 and the carriages moved inward as shown in Fig. 5 so that the chock blocks alone support the load in a manner which will be clear.

I do not wish to be confined to the specific details of construction, as it is to be understood that this specification is merely descriptive of one embodiment of my idea and that changes in detail may be made within the spirit of the invention.

What is claimed as new is:

1. The herein described bunk for logging vehicles comprising a pair of I-beams disposed in spaced relation to each other, plates secured to the lower flanges of said beams near the extremities of the latter, chock blocks movably mounted in the spaces between said beams above such plates, means for locking said blocks, rods for tripping the locking mechanism, said rods extending along the outside of the webs of said beams, a bunk plate overlying the upper flanges of said beams and having upstanding flanges along its edges, and bolts passing through this plate and downward through the outer flanges of said beams and outside said rods.

2. In a bunk for logging vehicles, the combination with a pair of beams connected with each other so as to produce an internal runway, and a bunk plate mounted over said beams near their midlength; of a longitudinally movable carriage within said runway, a rack bar secured along the carriage, a chock block pivoted to the outer end of the carriage and its body movable in the space between said beams, a pin through said body for resting on the upper edges of said beams when the block is raised, and a latch adapted to engage said rack bar.

3. In a bunk for logging vehicles, the

combination with a pair of beams connected with each other so as to produce an internal runway, and a bunk plate mounted over said beams near their midlength; of a longitudinally movable carriage within said runway, a rack bar secured along the carriage, a chock block pivoted to the outer end of the carriage and movable in the space between said beams, a latch pivoted to one of said beams and having a lip at its free end adapted to be engaged with said rack bar, and a latch-operating rod leading along the beams.

4. In a bunk for logging vehicles, the combination with a pair of beams connected with each other so as to produce an internal runway; of a longitudinally movable carriage within said runway, a rack bar along the carriage, a chock block pivoted to the carriage and movable in the space between said beams, a pivoted latch having a lip at its free end adapted to be engaged with said rack bar, a latch-operating rod mounted in guides along one end of said beams and having a handle, and a cam on said rod adapted to coact with the movable end of said latch.

5. In a bunk for logging vehicles, the combination with a pair of beams connected with each other so as to produce an internal runway; of a longitudinally movable carriage within said runway, a rack bar along the carriage, a chock block carried by the carriage, a U-shaped latch whereof one extremity is pivoted to one of said beams and the other extremity passes through a slot in this beam and is provided with a lip adapted to engage said rack bar, and a latch-operating rod extending along one of said beams and having a hook whose throat is provided with a cam moving beneath the free end of said latch and whose bill is adapted to be moved over said free end, for the purpose set forth.

6. In a bunk for logging vehicles, the combination with a pair of spaced beams inclosing a substantially rectangular runway, the upright webs of said beams being provided with slots, and for each beam a U-shaped latch whereof one extremity is pivoted through said web and the other extremity forms an arm which extends through said slot and carries a deflected lip; of a longitudinally movable carriage within each end of said runway, a rack bar thereon adapted to be engaged by said lip, load-retaining devices connected with said carriage, and a latch operating rod extending from the latch along one beam, for the purpose set forth.

7. In a bunk for logging cars, the combination with a pair of main beams inclosing a substantially rectangular runway, the beams being spaced from each other at their extremities at top and bottom; of a longi-

tudinally movable carriage within each end of said runway and composed of two I-beams connected with each other and having their inner flanges cut away at their outer ends, a bolt through their webs, a chock-block pivotally mounted at its inner end on said bolt and adapted to move in the space between the extremities of the main beams, a pin connecting the webs of the carriage-beams and limiting the rise of said block, and a limiting pin through the outer end of the latter in position to rest upon the main beams when the block is raised into engagement with said stop.

8. In a logging bunk, the combination with two main beams secured in spaced relation to each other, a carriage movable longitudinally between them, and a chock block loosely connected at its inner end to said carriage and having a hook at its outer end; of a stake having a loop at the lower end of its body, a cross bar within the loop adapted to rest against the extremities of said beams, and an eye within the loop adapted to be engaged with said hook.

9. In a logging bunk, the combination with two main beams secured in spaced relation to each other, a carriage movable longitudinally between them, and a chock block loosely connected at its inner end to said carriage and having a hook at its outer end; of a stake having a loop at the lower end of its body, hooks depending from the sides of said loop, said beams having eyes with which the hooks are adapted to engage, and an eye within said loop adapted to be engaged by the hook of the chock block.

10. In a logging bunk, the combination with two main beams secured in spaced relation to each other, a carriage movable longitudinally between them, and a chock block loosely connected at its inner end to said carriage and having a hook at its outer end; of a stake having a loop in its body of a size to inclose the extremities of said main beams, a cross bar within said loop adapted to rest against said extremities, hooks on the side bars of said loop with their bills projecting downward, said beams having eyes with which said hooks are adapted to be engaged, and a deflected rod across said loop above the cross bar and constituting an eye with which the hook on the chock block is adapted to be engaged.

11. In a logging bunk, the combination with two I-beams secured in spaced relation to each other and each having its outer upper flange cut away at its extremity to produce a notch, a carriage movable longitudinally between them, and a chock block loosely connected at its inner end to said carriage and having a hook at its outer end; of a stake having a loop at its lower end whose side bars are adapted to rest against the extremities of the lower outer

flanges and in said notches of the upper outer flanges, means for preventing the rise of the stake, and an eye in the upper portion of the loop engaged by the hook in the
5 chock block, for the purpose set forth.

12. In a logging bunk, the combination with two I-beams secured in spaced relation to each other and each having its outer upper flange cut away at its extremity to
10 produce a notch, a carriage movable longitudinally between them, and a chock block pivoted to said carriage; of a stake having a loop whose side bars are adapted to rest against the extremities of the lower outer
15 flanges and in said notches of the upper outer flanges and themselves have notches engaging the latter flanges, and a hook-and-eye connection between the upper portion of the loop and the chock block, for the purpose set forth.
20

13. In a logging bunk, the combination with two I-beams secured in spaced relation to each other and each having its outer upper flange cut away at its extremity to

produce a notch, a carriage movable longi- 25
tudinally between them, and a chock block pivoted to said carriage and having a hook; of a stake having a loop whose side bars are adapted to rest in said notches of the upper outer flanges and themselves have 30
notches engaging such flanges, a cross bar within the lower portion of the loop adapted to rest against the ends of the webs of said main beams, down-turned hooks on the side bars of said loop, the lower outer flanges 35
of said main beams being provided with eyes engaged by these hooks, and an eye in the upper portion of the loop engaged by the hook in the chock block, for the purpose set forth. 40

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

CLAYTON T. EAID.

Witnesses:

LUKE THORNTON,
MARY A. MACKINNON.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

DEFENDANTS EXHIBIT 4.

Cancellation of Contract.

Portland, Oregon March 27, 1913.

Whereas there was an agreement entered into on the 22d day of Dec., 1911, between C. T. Eauid party of the first part, and the Twohy Brothers Co., a corporaion organized under the laws of the State of Oregon, party of the second part, covering the manufacture of log bunks under letters patent issued to the party of the first part, and whereas there was a supplementary agreement entered into between the party of the first part and the party of the second part on the 28th day of March, 1912, and whereas it is mutually agreed between the party of the first part and the party of the second part to cancel said agreement and its supplement for a consideration, it is agreed that for the sum of two hundred and fifty dollars (\$250.00) in cash, receipt of which is hereby acknowledged, part of which sum is to be considered as payment in full by the party of the first part for such bunks as the party of the second part has manufactured and sold up to date under the letters patent held by the party of the first part and the balance is to be considered full and sufficient consideration to the party of the first part for the cancellation of said agreements, said agreements are hereby cancelled.

E. T. EAID

TWOHY BROS. CO.

By WARNICK C. WALDRON

Asst sec'y

Witness to both signatures

J. GREENE.

93

Defendant's Exhibit 7.

DEFENDANT'S EXHIBIT 7.

(No Model)

C. D. MATHENY.
BUNK FOR LOGGING TRUCKS.

No. 513,124.

Patented Jan. 23, 1894.

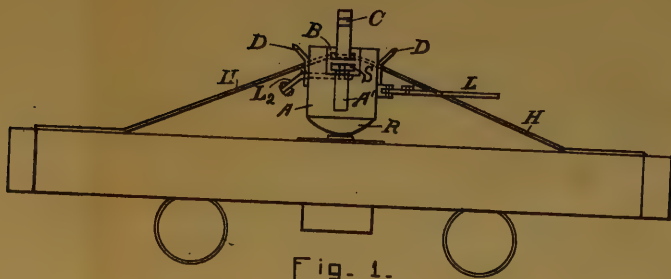


Fig. 1.

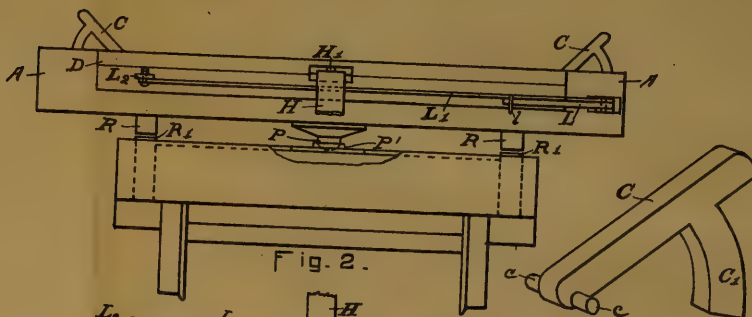


Fig. 2.

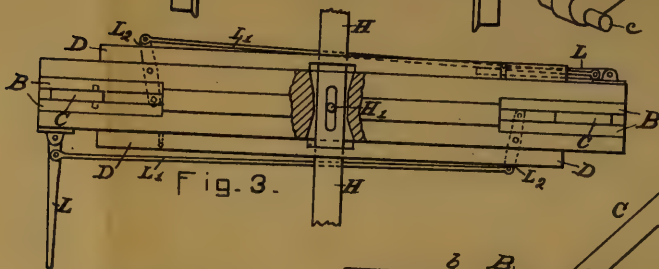


Fig. 3.

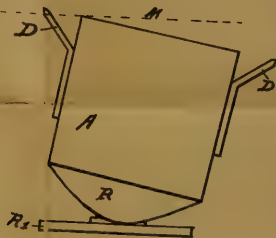


Fig. 5.

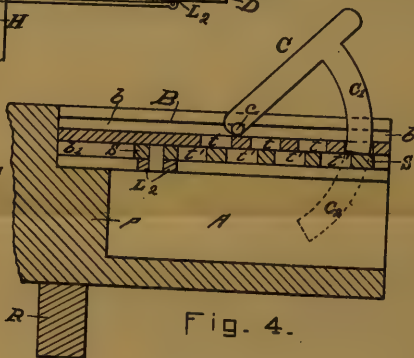


Fig. 4.

Witnesses.

Lee Wheeler
Renos James Rickard

Inventor.
C. D. Matheny.
by H. L. Reynolds,
his atty.

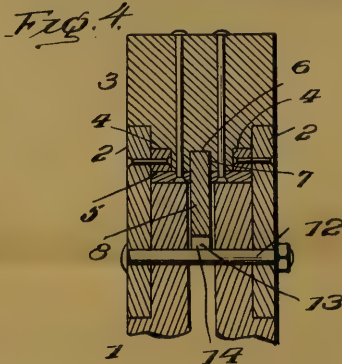
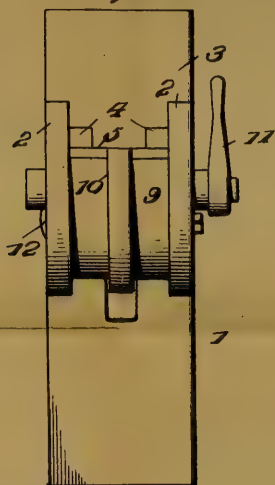
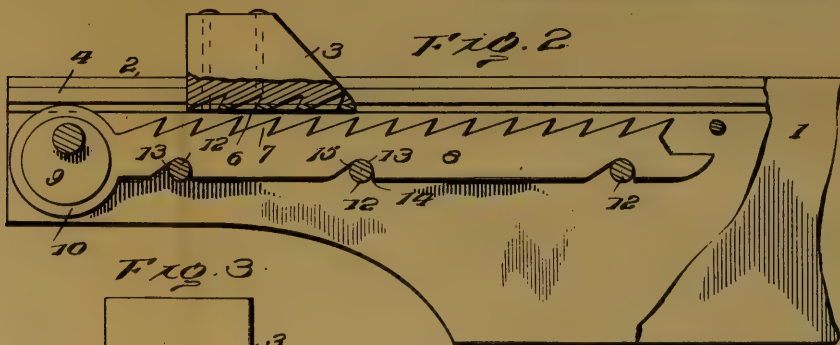
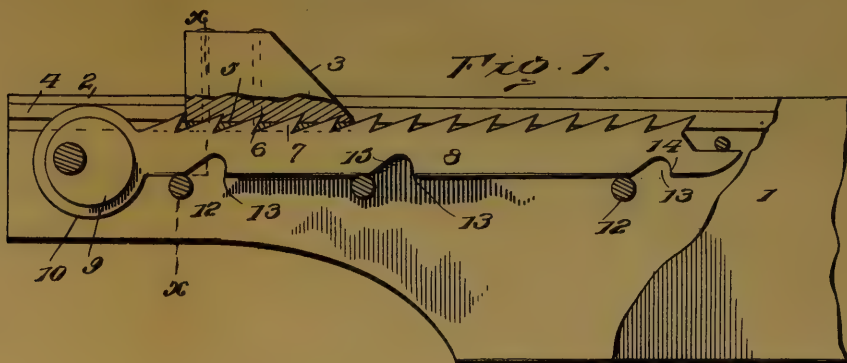
Defendants Ex Libit 8.

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DEFENDANT'S EXHIBIT 8.

T. D. PARSONS.
BOLSTER AND CHOCK FOR LUMBER TRUCKS.

APPLICATION FILED SEPT. 22, 1904.



Inventor

T. D. Parsons

Witnesses

Wm. H. Woodson

By

Phil. B. Lacey Attorney

(No Model)

No. 513,124.

C. D. MATHENY,
BUNK FOR LOGGING TRUCKS.

Patented Jan. 23, 1894.

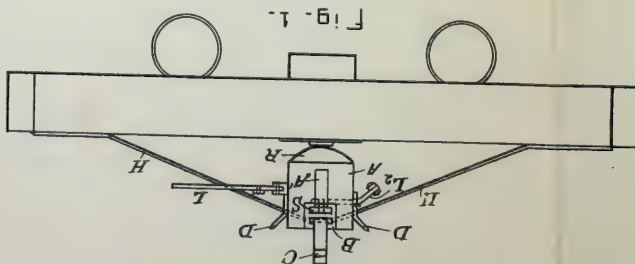


Fig. 1.

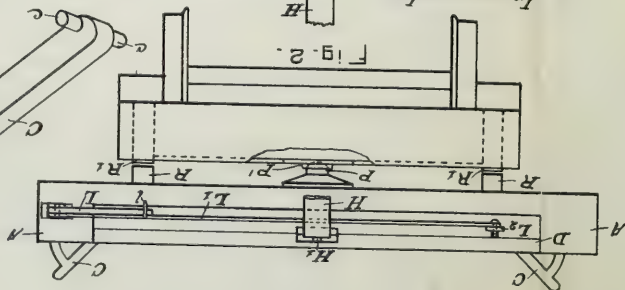


Fig. 2.

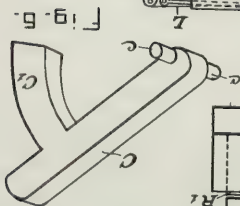


Fig. 3.

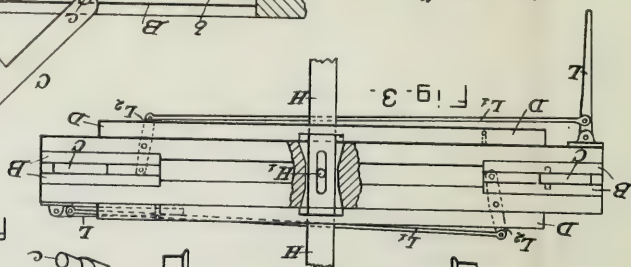


Fig. 4.

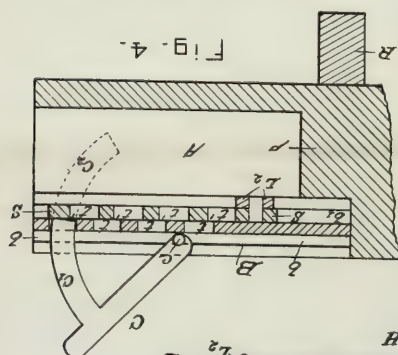


Fig. 5.

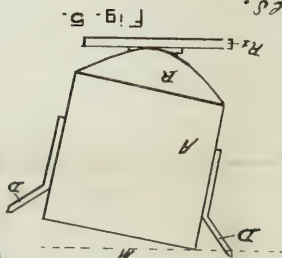


Fig. 6.

Inventor
C. D. Matheny
by H. F. Reynolds
Att'y.

Witnesses.
Geo. Miller
Amos James Richard

C. T. EAD.

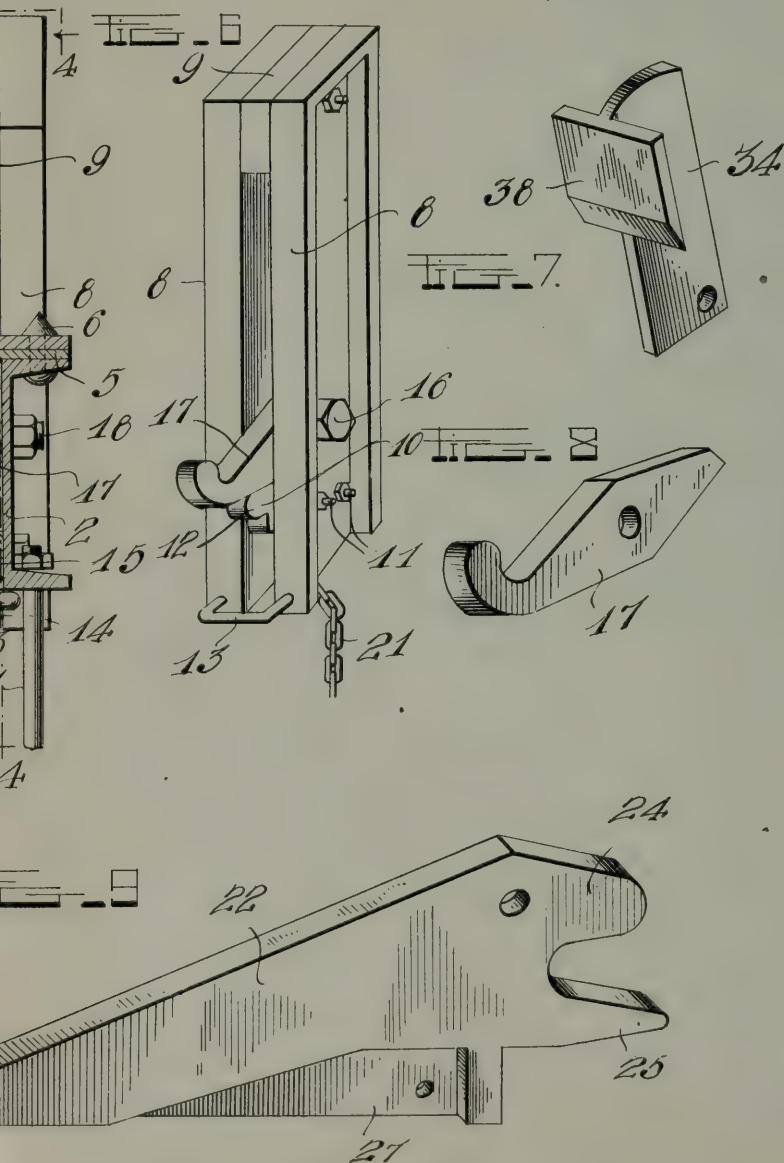
LOG BUNK AND STAKE FOR RAILWAY CARS.

APPLICATION FILED DEC. 29, 1910. RENEWED APR. 25, 1912.

Patented Jan. 21, 1913.

3 SHEETS—SHEET 3.

9.



UNITED STATES PATENT OFFICE.

THOMAS D. PARSONS, OF HATTIESBURG, MISSISSIPPI.

BOLSTER AND CHOCK FOR LUMBER-TRUCKS.

SPECIFICATION forming part of Letters Patent No. 790,915, dated May 30, 1905.

Application filed September 22, 1904. Serial No. 226,532.

To all whom it may concern:

Be it known that I, THOMAS D. PARSONS, a citizen of the United States, residing at Hattiesburg, in the county of Perry and State of Mississippi, have invented certain new and useful Improvements in Bolsters and Chocks for Lumber-Trucks, of which the following is a specification.

This invention relates to means for securing logs, lumber, and like material upon the bolsters of trucks or running-gear of cars or wagons used in the hauling of same.

The invention aims to provide for ready adjustment of the chock or load-retainer upon the bolster, the firm secureance of the same in the adjusted position, and its quick release when it is required to unload.

For a full description of the invention and the merits thereof and also to acquire a knowledge of the details of construction of the means for effecting the result reference is to be had to the following description and accompanying drawings.

While the essential and characteristic features of the invention are susceptible of modification, still the preferred embodiment of the invention is illustrated in the accompanying drawings, in which

Figure 1 is a side view of an end portion of a bolster, showing the invention, parts being broken away. Fig. 2 is a view similar to Fig. 1, showing the toothed bar disengaged from the chock or load-retainer. Fig. 3 is an end view of the bolster and cooperating parts. Fig. 4 is a transverse section of the bolster on the line *x-x* of Fig. 1.

Corresponding and like parts are referred to in the following description and indicated in all the views of the drawings by the same reference characters.

The bolster 1 may be of metal or wood or a combination of materials such as commonly provided in wagons and cars for hauling logs, timber, and like material. It is to be understood that each end of the bolster is to be similarly equipped with a chock or load-retainer and cooperating parts embodying the invention. As illustrated, the bolster is constructed of wood and is reinforced by side plates 2, attached thereto in any substantial manner and

projecting above the top side of the bolster to provide ways for the chock or load-retainer 3. Longitudinal bars 4 are riveted or otherwise secured to the inner sides of the upper portions of the plates 2 to form guides and cooperate with a plate 5 for preventing vertical displacement of the chock or load-retainer 3.

The chock or load-retainer 3 may consist of a wooden block and is designed to prevent lateral displacement of the load in the manner well understood. The lower portion of the chock or load-retainer is rabbeted in opposite sides to fit between the upper edge portions of the plates 2 and between the bars 4, as indicated most clearly in Figs. 3 and 4. The plate 5, secured to the under side of the chock or load-retainer 3, underlaps the bars 4, thereby preventing vertical displacement of the chock and holding the same in place in any adjusted position. The plate 5 is provided upon a medial line with a series of openings 6 to receive the teeth 7 along the upper edge of a toothed bar 8, provided for securing the chock or load-retainer in the required adjusted position. The lower side of the chock is longitudinally grooved opposite to the openings 6 to admit the points of the teeth 7 projecting above the plate 5 when in positive engagement therewith.

The toothed bar 8 is arranged in a longitudinal groove formed in the upper edge portion of the bolster and is mounted to receive both a longitudinal and a vertical movement, and for convenience of imparting this combined movement to the toothed bar 8 an eccentric 9 is provided and journaled to an end portion of the plates 2, an eccentric-strap 10 at the outer end of the toothed bar encircling the eccentric in the accustomed manner. An operating lever or handle 11 is fitted to a journal of the eccentric 9 for rotation thereof when it is required to operate the toothed bar either to release the chock or to secure the same. A series of pins 12 support the toothed bar and have their end portions laid into the side plates 2. These pins 12 may consist of the bolts or fastenings employed for securing the side plates to the bolster. Depressions 13 corresponding in position and number to the pins 12 are formed in the lower edge of the

med on a spacing block
the beams of the bunks
by suitable fastening
d of the spacing blocks
e engaged by the lugs
locks 10 of the stakes
engaged with the oppo-
k beams, said lugs and
a support for the stakes
ich are firmly bound to
s by the loops 13.

the beams of the stakes
ads are transversely dis-
ich are pivotally mount-
stake holding hooks 17
ich are adapted to pro-
between the outer ends
and into engagement
18 which are arranged
s shown in Fig. 4. On
beams of the bunks at
re secured stake bracing
a their outer ends lugs
e opposite sides of the
hold the same against
ovement. To one end of
the bunks is secured one
ing-chain 21 the other
red to the stake thereby
from becoming lost or
nected or removed from
beams.

de for the engagement
ing hook 17 with the
a the ends of the bunk
the disengagement of
e bolts for the purpose
akes I provide a hook
which is pivotally con-
upper end with a sup-
nged through the bunk
he lever 22 is pivotally
t 23 between the beams
a the outer end of said
outwardly projecting
or nose 24 below which
e distance therefrom is
ing and supporting lug

the beams as shown. The inner ends of the
levers 22 and levers 29 are connected to-
gether by cables 31 to which are connected
operating cables 32 leading to the opposite
sides of the car. When the pull is exerted
on the cables 31 and 32 the free ends of
the levers 22 and 29 will be swung upwardly
thereby rocking the crank 28 of said lever
29 and swinging the end of the link 26
connected with said crank 28 downwardly
which will exert a downward and inward
pull on the outer end of the lever 22. When
the inner end of the lever 22 is thus swing
upwardly the supporting lug 25 thereof
will be swung downwardly and inwardly
thereby removing said lug from the path
of the hook of the member 17 and the hook
releasing nose or lug 24 of said lever 22 will
push the hook 17 down out of engagement
with the bolt 18, thereby releasing the stake
which will drop out of engagement with
the end of the bunk beams. The cables 31
which are connected to the inner ends of
the levers 22 and to levers 29 pass upwardly
over guide pulleys or sleeves 33 arranged
between the beams of the bunks adjacent to
and above the inner ends of the levers 22
as shown.

When it is desired to replace a stake at
either end of one of the bunk beams the loop
bolt 13 on the lower end of the stake is
engaged with the lug 14 on the spacing
block at the adjacent end of the beam and
the stake is swung inwardly whereupon the
supporting lug 12 of the spacing block 10
will engage the upper side of the block 15
in the beam. The cables 31 and 32 are
pulled to swing the inner end of the lever
22 upwardly and the lug 25 on the outer end
thereof downwardly or away from the bolt
18 to permit the inner end of the hook to
enter between the lug 25 and the bolt where-
upon when the cables 31 and 32 are released
the inner end of the lever 22 will drop by
gravity thus causing the lug 25 to force the
inner end of the hook up into engagement
with the pin 18 thereby securely fastening
the stake to the ends of the bunk beams.

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toothed bar 8 and cooperate with said pins to effect vertical movement of the toothed bar either to project the teeth 7 into engagement with the chock or load-retainer or to withdraw them from engagement therewith. The inner or rear edge 14 of each of the depressions 13 is abrupt to form a stop-shoulder to limit the outward movement of the toothed bar, whereas the outer edge 15 is inclined to form, in effect, a cam to ride upon the pins 12 and effect a gradual rising of the toothed bar simultaneously with its inward movement, whereby the teeth 7 are projected into engagement with the chock or load-retainer, so as to fix its position. When the toothed bar 8 is moved outward, it receives at the same time a corresponding downward movement by the riding of the inclined edges 15 upon the pins 12, thereby withdrawing the teeth 7 from engagement with the chock or load-retainer and permitting adjustment of the latter after the toothed bar has reached the limit of its outward and downward movement. The teeth 7 have an inward inclination toward their points, so as to interlock vertically with the plate 5 when in proper engagement therewith, thereby positively holding the parts 3 and 8 against casual vertical displacement. The teeth engage with the plate 5 by means of an upward and inward movement and are withdrawn by a similar outward and downward movement. The openings 6 are of corresponding shape to the teeth. By reason of the peculiar formation of the teeth and their matching openings outward stress upon the chock or load-retainer causes firmer engagement of the interlocking parts, as will be readily comprehended.

Having thus described the invention, what is claimed as new is

1. In combination, a bolster, a chock or load-retainer adjustable longitudinally thereon, a toothed bar for securing the chock in the referred position, and means for imparting a simultaneous longitudinal and vertical movement to the toothed bar to effect engagement or disengagement of its teeth from said chock, substantially as specified.

2. In combination, a bolster, a chock or load-retainer adjustable longitudinally thereon, a toothed bar for securing the chock in an adjusted position, means for imparting longitudinal movement to the toothed bar, and pins and cam portions for imparting vertical movement to the toothed bar simultaneously with its longitudinal movement, substantially as specified.

3. In combination, a bolster, a chock ad-

justable upon the bolster, a plate secured to the chock and cooperating with the bolster to prevent vertical displacement of said chock, and a toothed bar adapted to cooperate with said plate to hold the chock in an adjusted position, substantially as specified.

4. In combination, a bolster, a chock adjustable thereon, a toothed bar cooperating with said chock to secure it in an adjusted position, and an eccentric for imparting a simultaneous longitudinal vertical movement to the toothed bar, substantially as set forth.

5. In combination, a bolster, a chock adjustable thereon, a toothed bar for securing the chock in an adjusted position, means for imparting a longitudinal movement to said toothed bar, and pins and cam portions for imparting vertical movement to the toothed bars simultaneously with its longitudinal movement, substantially as set forth.

6. In combination, a bolster, a chock adjustable thereon, a toothed bar for securing the chock in an adjusted position and having depressions or cut-away portions with one edge inclined, pins for supporting the toothed bar and adapted to cooperate with the inclined edges of the cut-away portions to effect positive movement of the toothed bar, and operating means for the latter substantially as specified.

7. In combination, a bolster, plates having portions projected above said bolster and having inner longitudinal extensions, a chock adjustable on the bolster, a plate secured to the under side of the chock and underlapping said inner longitudinal extensions, and a toothed bar for securing the chock in an adjusted position, substantially as specified.

8. In combination, a bolster, plates secured to the sides of the bolster and having edge portions projected upward therefrom, bars at the inner sides of said plates, a chock adjustable upon the bolster, a plate secured to the chock and underlapping said bars to prevent casual displacement of the chock, a toothed bar adapted to receive a longitudinal and a vertical movement for securing the chock in an adjusted position, and an eccentric journaled to the aforesaid plates and adapted to impart movement to the toothed bar, substantially as set forth.

In testimony whereof I affix my signature in presence of two witnesses.

THOMAS D. PARSONS. [L. s.]

Witnesses:

J. F. PHILLIPS,
R. T. STAPLETON

being formed on their
 ing lugs, log holding
 opposite ends of said
 gs arranged on the
 akes and adapted to
 ms of the bunks and
 the stake supporting
 stake holding bolts
 nds of the stakes and
 with the lugs on the
 acing blocks of said
 lts arranged through
 e beams, stake hold-
 nected to the stakes
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 ns and into operative
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 ooks and thereby dis-
 the ends of the beams.
 rs comprising pairs
 d beams, said beams
 in spaced relation,
 nged on the opposite
 id stakes comprising
 gether in spaced rela-
 and finishing plates
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 s to the outer ends of
 hing bolts arranged
 ends of the beams,
 pivoted to said stakes
 ged with the fasten-
 of the beams, hook
 g levers pivotally
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 formed on the outer
 adapted to engage the
 s and to hold the lat-
 ment with their fas-
 etaching lugs also
 ds of said levers and

adapted to disengage the hooks from their
 bolts when said levers are operated, cranked 45
 locking levers pivotally mounted on the un-
 der side of said beams, links to connect said
 cranks with said hook holding and releasing
 levers whereby the latter are locked in oper-
 ative position to hold said hooks in engage- 50
 ment with the bolts, operating cables con-
 nected to the ends of said levers whereby the
 latter are simultaneously operated from the
 opposite side of the car to release said hooks
 and thereby detach said stakes, and chock 55
 blocks having an adjustable and pivotal con-
 nection with said beams to hold the logs in
 position thereon.

6. A log bunk for cars comprising pairs
 of transversely disposed beams secured to- 60
 gether in spaced relation, means to secure
 said beams to the car, longitudinally slotted
 connecting plates secured to the upper edges
 of said beams, log holding stakes arranged on
 the opposite ends thereof, means to detach- 65
 ably secure said stakes in place whereby the
 logs may be released from the opposite side
 of the car, supporting bolts adjustably ar-
 ranged in said beams, chock blocks pivotally
 mounted on said bolts and adapted to pro- 70
 ject up through the slotted connecting plate
 of the beams, flanges formed on the inner
 edges of the upwardly projecting portions of
 said blocks and operating cables connected
 to the lower ends of the blocks whereby each 75
 of said blocks is swung upwardly from the
 opposite side of the car and held in oper-
 ative position above the beams.

In testimony whereof I have hereunto set
 my hand in presence of two subscribing wit- 80
 nesses.

CLAYTON T. EAID.

Witnesses:

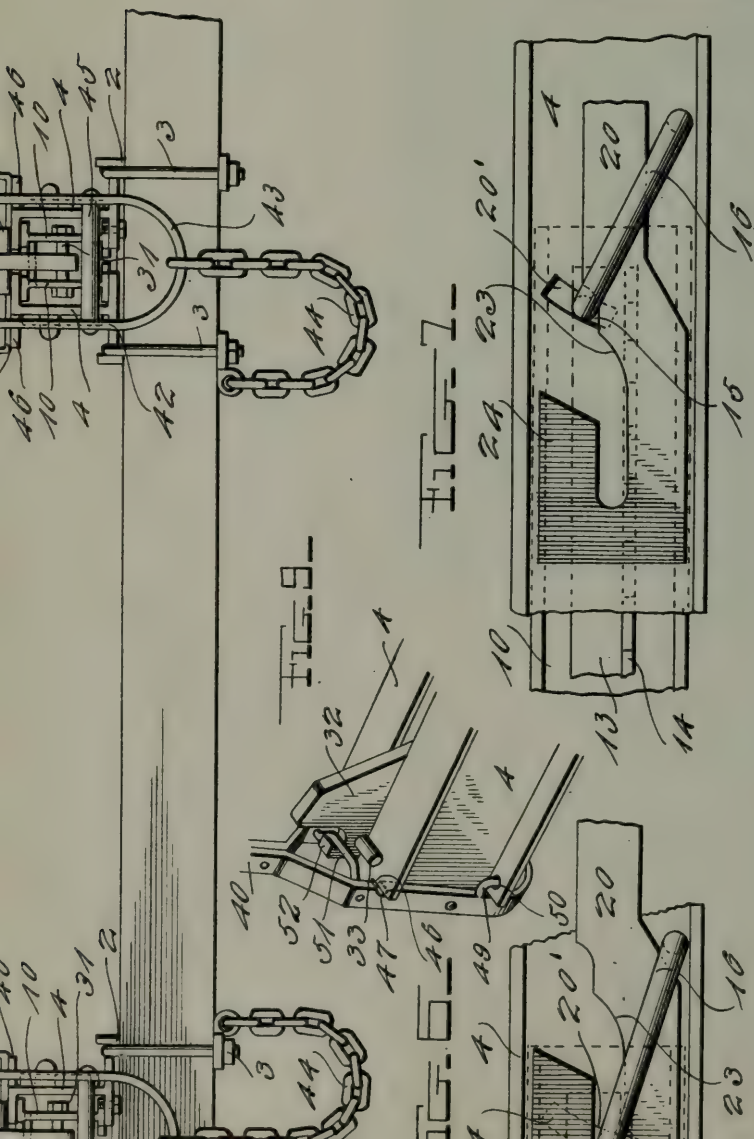
J. A. HOSHOR,
 R. E. MASON.

Defendant's Exhibit 9.

DEFENDANT'S EXHIBIT 9.

LOGGING CAR BUNK AND STAKE.
APPLICATION FILED FEB. 12, 1912.

2 SHEETS—SHEET 1.



No. 770,899.

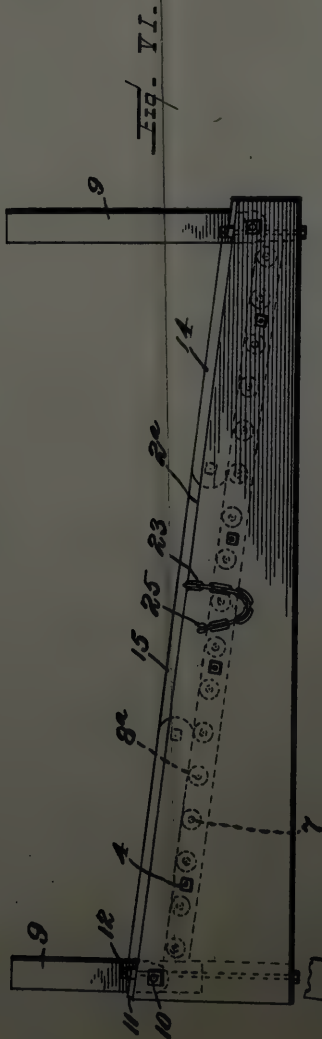
PATENTED SEPT. 27, 1904.

M. FOSHEE.
BOLSTER FOR DUMPING CARS.

APPLICATION FILED JULY 6, 1904.

NO MODEL.

2 SHEETS—SHEET 2.



WITNESSES

W. H. Kyle
James E. Spohn

INVENTOR
Mason Foshee

By *Walter Allen*
Attorney

UNITED STATES PATENT OFFICE.

MASON FOSHEE, OF CHAPMAN, ALABAMA.

BOLSTER FOR DUMPING-CARS.

SPECIFICATION forming part of Letters Patent No. 770,899, dated September 27, 1904.

Application filed July 5, 1904. Serial No. 215,255. (No model.)

To all whom it may concern:

Be it known that I, MASON FOSHEE, a citizen of the United States of America, and a resident of Chapman, in the county of Butler and State of Alabama, have invented certain new and useful Improvements in Bolsters for Dumping-Cars, of which the following is a specification.

My invention is an improvement in those bolsters for dumping-cars which are provided with means for retaining, releasing, and dumping a load.

One object of my invention is to provide a bolster with improved means for retaining the load while being transferred.

Another object of my invention is to provide a bolster with improved means for facilitating the dumping of the load at either side of the car.

Another object of my invention is to provide a bolster with improved means whereby the load is readily carried to either side of the car.

Another object of my invention is to provide a bolster with an improved carrying means in the form of a dumping-carriage of peculiar construction.

Another object of my invention is to provide a bolster with a carrying means in the form of a dumping-carriage and means for holding and releasing the dumping-carriage.

Another object of my invention is to provide means for limiting the movement of the carrying means.

Another object of my invention is to provide improved means for releasing the shiftable hooks, whereby the bolster-stakes are held in normal position.

With these and other objects in view to improve the construction of such bolsters my invention consists in the novel combination of devices and features of construction herein-after fully described and claimed.

In order that my invention may be fully understood, I will proceed to describe it with reference to the accompanying drawings, in which—

Figure I is a side elevation of my improved bolster for dumping-cars tilted to its operative position, having a carrying means in the

form of a carriage, the outer carriage-stake being shown in dotted lines in released position. Fig. II is a top plan view thereof, the outer carriage-stake being in normal position. Fig. III is a side elevation of my carrying means in the form of a carriage. Fig. IV is a detail longitudinal section of the bolster, taken on the line IV IV of Fig. II, looking in the direction of the arrow. Fig. V is a detail longitudinal section of the bolster, taken on the line V V of Fig. II, looking in the direction of the arrow. Fig. VI is a side elevation of my improved bolster having a longitudinal trough, series of rollers, and carrying means inclined toward the dumping end of the bolster. Fig. VII is a longitudinal section of my bolster in which the carrying means is in the form of an endless chain. Fig. VIII is a perspective view of a section of my preferred form of chain, consisting of rail-sections having rule-joints. Fig. IX is a top plan view of one end of my bolster, showing my means for releasing the hooks of the bolster-stakes.

1 is the bolster of a flat or skeleton logging-car constructed with a longitudinal trough 2 extending its whole length and with recesses 3 in the ends of the bolster beneath the trough. Fitted against and secured to the walls of the trough by means of bolts 4 are a pair of oppositely-disposed binding-plates 5, each having a series of holes or orifices 6, Fig. IX, which receive the journals 7 of a series of conveyer-rollers 8, preferably made of metal.

9 represents bolster stakes or stanchions located one at each end of the bolster and having their lower ends pivoted in the trough over the recesses 3 by means of bolts 10. These bolster-stakes are prevented from moving inward by the load which is placed between them, and they are normally supported in upright position against outward movement by means of horizontally-arranged hooks 11, pivoted upon the top of the bolster by vertical bolts 12. The hooks 11 are held in place and from accidentally leaving the bolster-stakes (due to the vibration of the car) by means of headed retaining pins or spikes 13, inserted in the top of the bolster, so as to be readily removed for dumping the load.

The bolster-stakes are provided for the usual purpose of sustaining the load from sidewise movement. As a means for supporting and facilitating the dumping of the load I provide a carrying means adapted to support the load upon the conveyer-rollers and to travel or run freely with the load upon the conveyer-rollers to either side of the car when the load is released. As shown in Figs. I, II, III, and VI, the carrying means is in the form of a carriage consisting of two pairs of parallel outer bars 14 and an intermediate bar 15. The inner ends of the outer bars 14 are hinged to the ends of the intermediate bar 15 by means of bolts 16. These bars are preferably formed of iron or steel plates one and one-fourth by two and one-half inches in dimensions and set up edgewise on the conveyer-rollers. Extending across the outer ends of the outer bars 14 are pivot-bolts 17, and on these pivot-bolts between the outer ends of the outer bars, I mount carriage stakes or stanchions 18, having bolt-openings in the form of slots 19, so as to enable these carriage-stakes to be turned or raised or lowered on their pivot-bolts. These carriage-stakes are so positioned with relation to the conveyer-rollers 8 and bolster that they are normally held in upright position, with their lower ends in engagement with or lapping the ends of the bolster within the recesses 3, so as to hold the load and carrying means from shifting toward the ends of the bolster until the carriage-stakes 18 are raised from the recesses 3 to a position above the rollers 8 and to enable the carriage-stakes to pass over the conveyer-rollers 8 with the load either toward one end or the other end of the bolster.

Mounted upon the outer end of one of each pair of the outer bars 14 of the carriage are horizontally-arranged hooks 19^a, pivoted by bolts 20 to the bars and engaging the carriage-stakes, so as to hold them in their normal upright position against the load, and thus preventing them from falling outward when raised until it is desired to release them. These bars 14 are also provided with laterally-extending eye-brackets 21, in which are inserted removable headed pins or spikes 22 for holding the hooks 19 from accidentally leaving the carriage-stakes.

23 is a chain for limiting the movement of the carrying means, secured at one end to an eye 24 upon the side of the carrying means and at the other end to an eye 25 upon the side of the bolster.

26 is a bumper for supporting the ends of the bolsters from which the load is to be dumped.

Instead of tilting the car, as indicated by the inclined position of the bolster shown in Figs. I, IV, V, and VII, for the purpose of throwing the weight of the load to one side I may provide the bolster with an inclined trough 2^a and a correspondingly-inclined series of conveyer-rollers 8^a and conveying

means mounted upon the rollers, as shown in Fig. VI. In Fig. VII, I show another form of carrying means, in which I substitute for the carriage a continuous chain of short paired parallel bars 14^a and intermediate bars 15^a, connected by bolts 16^a and adapted to travel or run on a series of rollers 8^b and around end rollers 8^c. The chain may be constructed of sections of L-rails 14^b, having rule-joints 15^b, connected by bolts 16^b, as shown in Fig. VIII. This form of chain provides a broad base for the carrying means.

Referring to Fig. IX, I show the means which I have provided for releasing the hooks 19^a from the bolster-stakes 9 after their retaining-pins 13 have been removed. 27 is a sliding plate having a slot 28, receiving the upper end of a pivot-bolt 29, whereby it is mounted over the end recess 3 of the bolster. This sliding plate is located in such a position with relation to the bolster-stake as to impinge against the end of the hook 19^a. Located upon the top of the bolster, at the opposite side to the bolster-stake, is a sliding wedge 30, having a slot 31, through which is inserted a headed pin 32, whereby it is secured to the bolster. 33 is another headed pin or bolt, inserted in the bolster and located adjacent to the heel of the sliding plate 27, and between the latter and the pin 33 the point of the sliding wedge is positioned so that when the latter is driven outward by a suitable tool in the hands of an operator the sliding plate 27 will be forced toward the hook 19^a and release it, when the bolster-stake will fall outward and turn the sliding plate 27 on its pivot-bolt 29 out of the way, thus permitting the stake to drop out of the way of the load to be dumped.

A car provided with my improved bolsters and the carrying means and loaded with logs or timbers is brought to the dumping-ground or pond, where the railway-track is elevated and the inner side of the track is built higher than the side next to the dumping-ground or pond. The bolsters are therefore in the inclined position. (Shown in Figs. I, II, and III.) To dump the load, the means for holding the outer bolster-stakes are released and the bolster-stakes fall outward, the load being sustained by the carriage-stakes, which are in their lowest position. The operator next goes to the inner side of the car and strikes the carriage-stakes on that side of the car upward to disengage their lowest ends from the bolsters, so as to release the carrying means and enable the carriage-stakes farthest from the dumping side to pass over the rollers. The load being released, the carrying means and its load of logs travel upon the rollers and the load is immediately dumped onto the dumping-ground or into the pond. The car is prevented from tipping or turning over at the dumping side by bringing it to such a position as to permit the outer ends of the bolsters to be supported upon the bumper 26.

It will be clearly understood that in carrying my invention into practical use two or more of these bolsters are employed with a car which may be either a skeleton, flat, or other car. In some instances I may dispense with the bolster-stakes, relying upon the stakes of the carrying means for retaining the load; but for additional security in transporting the loads I prefer to employ the bolster-stakes for additional strength. In like manner the carriage-stakes may be dispensed with and the bolster-stakes relied upon to secure the loads.

Having thus described my invention, the following is what I claim as new therein and desire to secure by Letters Patent:

1. A bolster for a dumping-car constructed with a longitudinal trough, a series of conveyer-rollers journaled in the walls of the trough, and stakes secured to the bolster at the ends of the trough.

2. A bolster for a dumping-car constructed with a longitudinal trough, binding-plates fitted in the trough and secured to the walls thereof, a series of conveyer-rollers journaled in the binding-plates, and stakes secured to the bolster at the ends of the trough.

3. A bolster for a dumping-car constructed with a longitudinal trough, a series of conveyer-rollers journaled in the walls of the trough, carrying means adapted to travel upon the conveyer-rollers, and stakes secured to the bolster at the ends of the trough.

4. A bolster for a dumping-car constructed with a longitudinal trough, a series of conveyer-rollers, journaled in the walls of the trough, carrying means adapted to travel upon the conveyer-rollers, a chain for limiting the movement of the carrying means connected with the carrying means and with the bolster and stakes secured to the bolster at the ends of the trough.

5. A bolster for a dumping-car constructed with a longitudinal trough, a series of conveyer-rollers journaled in the walls of the trough, stakes pivoted to the bolster, at the ends of the trough, and shiftable means for holding the stakes in their normal position.

6. A bolster for a dumping-car constructed with a longitudinal trough, binding-plates fitted in the trough and secured to the walls thereof, a series of conveyer-rollers journaled in the binding-plates, stakes pivoted to the bolster at the ends of the trough, and shiftable means for holding the stakes in their normal position.

7. A bolster for a dumping-car constructed with a longitudinal trough, recesses in the ends of the bolster, a series of conveyer-rollers, journaled in the walls of the trough, stakes pivoted to the bolster at the ends of the trough above the recesses, and shiftable means for holding the stakes in their normal position.

8. A bolster for a dumping-car constructed with a longitudinal trough, recesses in the ends

of the bolster, binding-plates fitted in the trough and secured to the walls thereof, a series of conveyer-rollers, journaled in the binding-plates, stakes pivoted to the bolster at the ends of the trough above the recesses, and shiftable means for holding the stakes in their normal position.

9. A bolster for a dumping-car constructed with a longitudinal trough, a series of conveyer-rollers journaled in the walls of the trough, carrying means, adapted to travel upon the conveyer-rollers, stakes pivoted to the bolster, at the ends of the trough, and shiftable means for holding the stakes in their normal position.

10. A bolster for a dumping-car constructed with a longitudinal trough, binding-plates fitted in the trough and secured to the walls thereof, a series of conveyer-rollers journaled in the binding-plates, carrying means adapted to travel upon the conveyer-rollers, stakes pivoted to the bolster at the ends of the trough, and shiftable means for holding the stakes in their normal position.

11. A bolster for a dumping-car constructed with a longitudinal trough, recesses in the ends of the bolster, a series of conveyer-rollers, journaled in the walls of the trough, carrying means, adapted to travel upon the conveyer-rollers, stakes, pivoted to the bolster at the ends of the trough above the recesses, and shiftable means for holding the stakes in their normal position.

12. A bolster for a dumping-car constructed with a longitudinal trough, recesses in the ends of the bolster beneath the trough, binding-plates fitted in the trough and secured to the walls thereof, a series of conveyer-rollers, journaled in the binding-plates, carrying means, adapted to travel upon the conveyer-rollers, stakes pivoted to the bolster at the ends of the trough above the recesses, and shiftable means for holding the stakes in their normal position.

13. A bolster for a dumping-car constructed with a longitudinal trough, a series of conveyer-rollers journaled in the walls of the trough, carrying means consisting of bars hinged together and adapted to travel upon the conveyer-rollers, stakes pivoted to the bolster, at the ends of the trough, and shiftable means for holding the stakes in their normal position.

14. A bolster for a dumping-car constructed with a longitudinal trough, binding-plates fitted in the trough and secured to the walls thereof, a series of conveyer-rollers journaled in the binding-plates, carrying means consisting of bars hinged together and adapted to travel upon the conveyer-rollers, stakes pivoted to the bolster at the ends of the trough, and shiftable means for holding the stakes in their normal position.

15. A bolster for a dumping-car constructed with a longitudinal trough, recesses in the ends

DEFENDANTS EXHIBIT 4.

Cancellation of Contract.

Portland, Oregon March 27, 1913.

Whereas there was an agreement entered into on the 22d day of Dec., 1911, between C. T. Eaid party of the first part, and the Twohy Brothers Co., a corportaion organized under the laws of the State of Oregon, party of the second part, covering the manufacture of log bunks under letters patent issued to the party of the first part, and whereas there was a supplementary agreement entered into between the party of the first part and the party of the second part on the 28th day of March, 1912, and whereas it is mutually agreed between the party of the first part and the party of the second part to cancel said agreement and its supplement for a consideration, it is agreed that for the sum of two hundred and fifty dollars (\$250.00) in cash, receipt of which is hereby acknowledged, part of which sum is to be considered as payment in full by the party of the first part for such bunks as the party of the second part has manufactured and sold up to date under the letters patent held by the party of the first part and the balance is to be considered full and sufficient consideration to the party of the first part for the cancellation of said agreements, said agreements are hereby cancelled.

E. T. EAID

TWOHY BROS. CO.

By WARNICK C. WALDRON

Asst sec'y

Witness to both signatures

J. GREENE.

ing blocks, links pivoted to the beam and connected to each other to be operated simultaneously for elevating the serrated bar, and adjustable block carried thereby, substantially
5 as shown, and for the purpose set forth.

2. In combination with the beam A, guide-strips B B' B', vertical moving bars held by said guide-strips and provided with suitable sliding blocks, D D, links E, pivotally secured
10 to the beam A and to connecting-bars F, and the trip-rods G, pivotally secured to the ends of the bars H, the parts being organized substantially as shown, and for the purpose set forth.

3. In combination with a beam, A, a vertically-movable serrated bar carrying sliding
15 blocks D, links E, having the upper portions thereof bifurcated and one of the sides recessed, a connecting-bar pivotally secured to

said links, and a trip-rod for operating the same, substantially as shown, and for the purpose set forth. 20

4. In combination with a compound trip-rod, G, for the purpose set forth, a wrench or lever for moving one of the sections thereof, having a bifurcated head, one member extending beyond
25 the other and curved at its end to operate or depress a spring-catch employed for holding the trip-rod, substantially as shown, and for the purpose set forth.

In testimony whereof I affix my signature in
30 presence of two witnesses.

MANLY WILBUR.

Witnesses:

L. S. BOOTH,
W. B. JONES.

For Mr. Wright

101

89 93
101

Exhibit 11

DEFENDANT'S EXHIBIT 11.

(No Model.)

R. J. THOMPSON.
DOG ATTACHMENT FOR LOG CARS.

No. 416,128.

Patented Nov. 26, 1889.

Fig. 1.

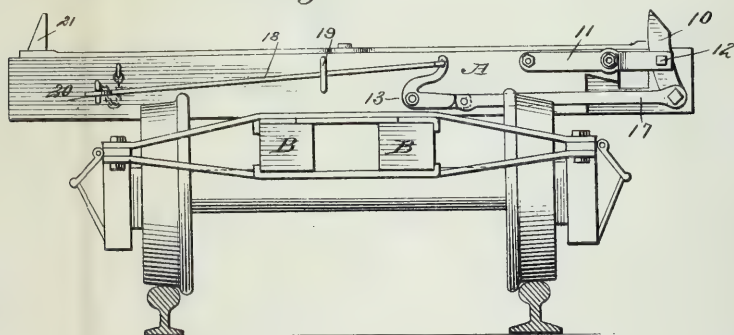


Fig. 2.

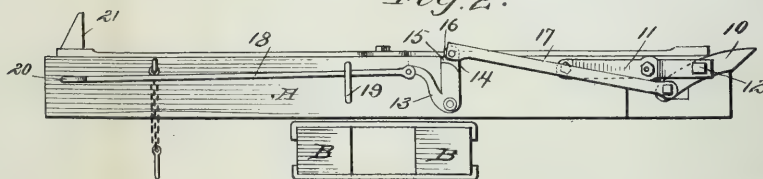


Fig. 3.

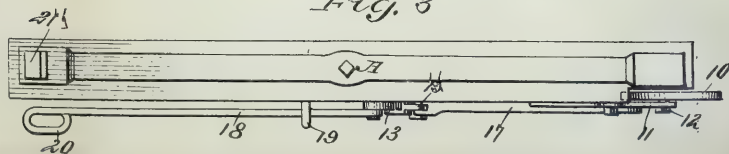


Fig. 4.

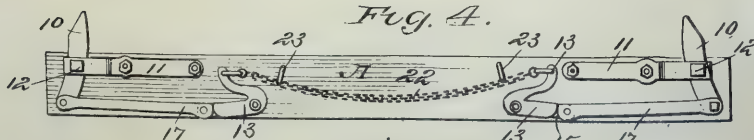
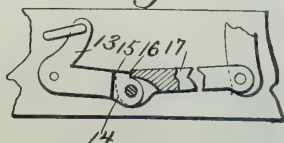


Fig. 5.



WITNESSES:

W. R. Davis.
C. Sedgwick

INVENTOR:

R. J. Thompson

BY

Munn & Co.
ATTORNEYS.

UNITED STATES PATENT OFFICE.

ROBERT J. THOMPSON, OF GRANDIN, MISSOURI.

DOG ATTACHMENT FOR LOG-CARS.

SPECIFICATION forming part of Letters Patent No. 416,128, dated November 26, 1889.

Application filed May 29, 1889. Serial No. 312,582. (No model.)

To all whom it may concern:

Be it known that I, ROBERT J. THOMPSON, of Grandin, in the county of Carter and State of Missouri, have invented a new and Improved Dog Attachment for Log Cars, Wagons, &c., of which the following is a full, clear, and exact description.

My invention relates to an improved dog attachment for log cars, wagons, sleds of all descriptions, and log-decks in saw-mills, and has for its object to provide a simple device whereby the logs may be effectually retained in position upon the body of the car or wagon or other log carrier or holder and expeditiously released therefrom at the proper time.

The invention has for its further object to provide a series of dogs so arranged that the said dogs may be raised or lowered simultaneously, and wherein the dogs upon either side of the body may be manipulated independently.

The invention consists of the novel construction and combination of the several parts, as will be hereinafter more fully set forth, and pointed out in the claims.

Reference is to be had to the accompanying drawings, forming a part of this specification, in which similar letters and figures of reference indicate corresponding parts in all the views.

Figure 1 is an end view of a log-car having my improvement applied thereto, and illustrating the dog in position to retain the logs upon the car; also illustrating a pivoted dog at one end of the bolster and a rigid dog at the opposite end. Fig. 2 is a side elevation of the bolster illustrated in Fig. 1, showing a dog in position to admit of the dumping of the logs. Fig. 3 is a plan view of the device, a slightly-modified form of bracket being shown. Fig. 4 is a side elevation of a bolster, illustrating a pivoted dog applied to both ends thereof; and Fig. 5 is a detail view of the manipulating-lever and the link-connection between the said lever and dog.

A represents the bolster of a car, wagon, or other log carrier or holder, illustrated in the drawings as forming a portion of a car-truck and as secured to the reach-beams B thereof. As the device is duplicated upon both the forward and the rear bolsters, I have shown its application to one bolster only.

In Fig. 1 the dog 10 is pivoted to the outer face of the bolster, near one end only, and the manner of pivoting the said dog consists of securing to the said outer face of the bolster an angle-bracket 11, the outer end of which is removed a slight distance from the contiguous face of the bolster, and a pivot-pin 12 is passed through the outer end of the bracket, through the dog at or near its center, and into the bolster. By forming the bracket in the manner shown one dog is forced outward to permit the logs to be rolled off, as illustrated in Fig. 2. The outward movement of the said dog, as shown in the drawings, is limited, as its lower end contacts with the under edge of bracket in order to form a skid to regulate the dropping of the log; but for or on log-decks or similar uses this movement would not be limited and the dog would be dropped entirely clear.

Upon one side of the center of the bolster A, upon the outer face of the same, an elbow or crank lever 13 is pivoted. The end of one member of the said lever is recessed upon both sides, as illustrated at 14 in Fig. 2, and likewise in Fig. 5, whereby a tongue 15 is formed of less thickness than the body of the lever, and one side edge of said tongue is cut away to form a shoulder 16. The base walls of the side recesses 14 of the lever are convex. The reduced end of the lever is connected with the lower extremity of the dog 10 by means of a link 17, one end of the said link being pivoted to the dog, and the other end is pivoted to the tongue of the angle or elbow lever 13. The inner side of the link, which is pivoted to the lever, is slotted upon its inner face to receive the tongue and provide a shoulder, as is shown in Fig. 5. By providing a rule-joint on this end between the elbow-lever and the link 17, when the member of the lever carrying the tongue and the link are brought downward slightly below a horizontal position, as illustrated in Fig. 1, the dog is forced to vertical position and the joint is locked. The elbow-lever, when one dog only is employed upon each bolster, is preferably manipulated through the medium of a rod 18, attached thereto, as shown in Figs. 1 and 2, which rod passes through suitable guides 19 to a point at or near the opposite end of the bolster and is

made to terminate in a handle 20. When a single pivoted dog is employed upon each bolster at the opposite end, a fixed dog 21 is located. In manipulating the pivoted dog, when the rod 18 is pulled outward, the member of the elbow-lever carrying the tongue is brought to a vertical position, whereby the link is borne forward and the dog depressed. When the dog is in this position, the logs may be readily rolled off, or if the car or other carriage is standing on an incline the logs roll off by gravitation and unloading is greatly facilitated. By pushing the rod 18 inward the member of the elbow-lever pivoted to the link and likewise the link are forced to the position shown in Fig. 1, and the lower end of the dog is forced outward, whereby the latter is carried to the vertical position and locked in such position, effectually holding the logs upon the carriage in place.

In Fig. 4 I have illustrated a pivoted dog located at each end of the bolster. The elbow-lever of each of the dogs is connected by a chain or rope 22, upon which chain or rope, near each lever, I usually provide a ring 23, whereby either of the dogs may be manipulated independently. By drawing downward upon the rope or chain 22 at the center both dogs are simultaneously carried downward to the open position; but if the ring to the right is drawn upon, the left-hand dog only will be thrown down, or vice versa. When a chain is employed, as shown in Fig. 4, the dogs are forced to a locked or vertical position by bearing against their outer edges or by pressing down the links 17.

This invention is equally applicable to the frames of trucks or wagons carrying round

packages—such as barrels, casks, &c.—and will effectually retain the load upon the vehicle and admit of the convenient and expeditious discharge therefrom.

Having thus described my invention, I claim as new and desire to secure by Letters Patent—

1. The combination, with the bed of a vehicle, of a dog pivoted thereto, an operating-lever, and a link pivoted to the said dog and attached to said lever by means of a rule-joint, substantially as shown and described.

2. The combination, with the bed of a vehicle, of a dog pivoted thereto, an elbow-lever, a link pivoted to the elbow-lever and to the dog, and means for operating the said elbow-lever, substantially as described.

3. The combination, with a bolster or cross-beam of a log carrier or holder or other vehicle, of a dog pivoted thereto extending above the same, an elbow-lever, a link pivoted to the dog and connected to one member of the said lever by a rule-joint, and means, substantially as shown and described, for manipulating the lever, as and for the purpose specified.

4. The combination, with the bolster or cross-beam of a log carrier or holder or other vehicle, of a bracket secured thereto having one outwardly-curved end, a dog pivoted between the curved end of the bracket and the bolster, an elbow-lever, a link pivoted to the dog and connected with one member of the elbow-lever by a rule-joint, and means, substantially as shown and described, for manipulating the lever, as specified.

ROBERT J. THOMPSON.

Witnesses:

WM. H. CATERN,
GEO. K. SMITH.

74
103

Will Boy #2.

DEFENDANT'S EXHIBIT 12.

(No Model.)

G. W. WARNER.

LOCK FOR STANDARDS OR DOG ATTACHMENTS OF LOGGING CARS.

No. 556,230.

Patented Mar. 10, 1896.

Fig. 1.

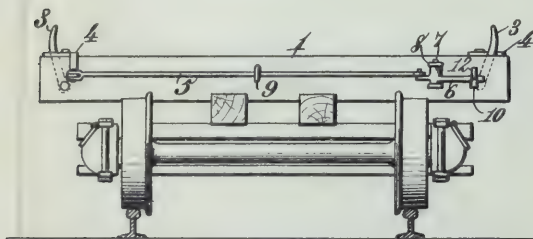


Fig. 2.

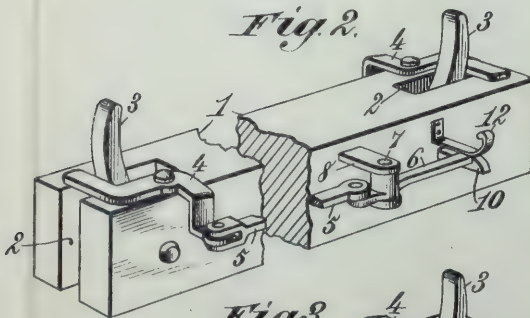
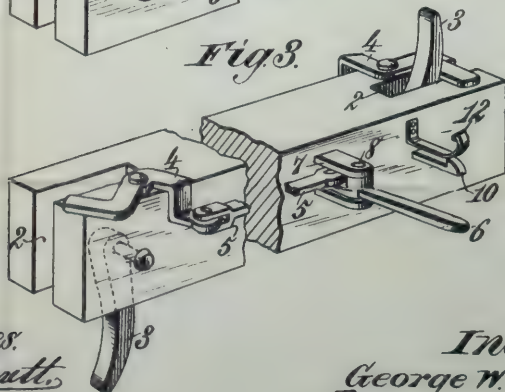


Fig. 3.



Witnesses:
Robert Smith
Geo. W. Ma.

Inventor:
George W. Warner.
By *James L. Norris*
Atty.

UNITED STATES PATENT OFFICE.

GEORGE W. WARNER, OF ROLFE, PENNSYLVANIA, ASSIGNOR OF ONE-HALF
TO THOMAS C. THOMPSON, OF SAME PLACE.

LOCK FOR STANDARDS OR DOG ATTACHMENTS OF LOGGING-CARS.

SPECIFICATION forming part of Letters Patent No. 556,230, dated March 10, 1896.

Application filed January 10, 1896. Serial No. 574,996. (No model.)

To all whom it may concern:

Be it known that I, GEORGE W. WARNER, a citizen of the United States, residing at Rolfe, in the county of Elk and State of Pennsylvania, have invented new and useful Improvements in Locks for the Standards or Dog Attachments of Logging-Cars, of which the following is a specification.

This invention relates a lock for the standards or dog attachments of logging-cars, and has for its object to provide a simple and effective means for preventing the standards from being jolted out of a raised position and to permit release and dropping of the standards when it is required to dump the load.

The invention consists in the combination, with a pivoted standard, of an angle-lever fulcrumed to the car in position to engage with and lock or trip the standard, as required, and a jointed operating-lever adapted to secure the said angle-lever or trip in its locked position.

The invention also consists in features of construction and novel combinations of the parts of a locking mechanism for the standards of logging-cars and other vehicles, as hereinafter described and claimed.

In the annexed drawings, illustrating the invention, Figure 1 is an end elevation of a car provided with my improved logging attachments. Figs. 2 and 3 are detail perspective views.

The car, wagon, or other log-carrier is provided at or near its ends with cross-beams or bolsters 1, as usual. In the ends of these bolsters 1 are open-ended slots or mortises 2 in which the standards 3 are pivoted. On the top of the bolster and at one side of each slot 2 is fulcrumed an angle-lever 4, one arm of which is adapted to extend across the top of the slot and at the outside of the raised standard 3 in such manner as to hold the standard upright and thereby retain the lumber, logs, or other material upon the car, so that the load cannot roll off. The other arm of the angle-lever 4 is extended downward at one side of the bolster 1 and formed with a horizontal projecting lug for pivotal connection with the bottom end of a link or lever section 5, the other end of which pivotally connects with one end of an operating lever

or handle 6 fulcrumed on a vertical pivot 7 in bearings 8 that project from the bolster. A guide 9 may be provided for the link or lever section 5, if preferred.

When the lever-handle 6 is turned outwardly the angle-lever 4 will be swung away from the slot 2 so as to permit the standard 3 to fall, and while the standards 3 on one side of a car are in this lowered position the logs may be quickly and easily rolled off from the car.

After the standards 3 are turned upward in the open-ended slots of the bolsters, they can be securely locked by throwing the lever-handles 6 toward or parallel with the bolster, thus swinging the locking angle-levers 4 across the slots 2 and at the outside of the several standards. In the locked position of the angle-lever 4 the sections 5 and 6 of the jointed operating-lever will be extended or in alignment with each other, and the end of the handle-section 6 will engage a hook 10 projecting from the bolster 1, a spring 12 being preferably arranged above and in bearing contact with the top of the hook 10 so as to assist it in retaining the lever-handle 6 and thereby prevent the standard and its locking and trip lever 4 from being jolted or jarred out of position by movements of the car. The outer end of the spring 12 is so formed that it will readily yield to permit engagement of the lever-handle 6 with the hook 10 and immediately return to its bearing on the hook projection when the lever has passed behind the same.

By pulling the lever-handle 6 outward from its engagement with the hook 10 and spring 12 the locking and tripping angle-lever 4 will be swung away from the slot 2 and permit the standard to fall. If it is desired to throw the angle-lever 4 to its locking position from the side of the car, it may be acted on directly, so that it will in turn act on and extend the lever-sections 5 and 6, the yielding of the spring 12 permitting the handle-section 6 to readily engage with the hook 10, thereby locking the several levers securely. The operating-lever being formed in two sections 5 and 6, having a jointed connection with each other and with the angle locking-lever 4, the latter is readily thrown square across the slot

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justable upon the bolster, a plate secured to
the chock and coöperating with the bolster to 60
prevent vertical displacement of said chock,
and a toothed bar adapted to coöperate with
said plate to hold the chock in an adjusted po-
sition, substantially as specified.

4. In combination, a bolster, a chock ad- 65
justable thereon, a toothed bar coöperating
with said chock to secure it in an adjusted po-
sition, and an eccentric for imparting a simul-
taneous longitudinal vertical movement to the
toothed bar, substantially as set forth. 70

5. In combination, a bolster, a chock ad- 70
justable thereon, a toothed bar for securing
the chock in an adjusted position, means for
imparting a longitudinal movement to said
toothed bar, and pins and cam portions for 75
imparting vertical movement to the toothed
bar simultaneously with its longitudinal move-
ment, substantially as set forth.

6. In combination, a bolster, a chock ad- 80
justable thereon, a toothed bar for securing
the chock in an adjusted position and having
depressions or cut-away portions with one
edge inclined, pins for supporting the toothed
bar and adapted to coöperate with the inclined
edges of the cut-away portions to effect posi- 85
tive movement of the toothed bar, and oper-
ating means for the latter substantially as
specified.

7. In combination, a bolster, plates having 90
portions projected above said bolster and hav-
ing inner longitudinal extensions, a chock ad-
justable on the bolster, a plate secured to the
under side of the chock and underlapping said
inner longitudinal extensions, and a toothed
bar for securing the chock in an adjusted po- 95
sition, substantially as specified.

8. In combination, a bolster, plates secured 100
to the sides of the bolster and having edge
portions projected upward therefrom, bars at
the inner sides of said plates, a chock adjust-
able upon the bolster, a plate secured to the
chock and underlapping said bars to prevent
casual displacement of the chock, a toothed
bar adapted to receive a longitudinal and a
vertical movement for securing the chock in 105
an adjusted position, and an eccentric jour-
naled to the aforesaid plates and adapted to
impart movement to the toothed bar, substan-
tially as set forth.

In testimony whereof I affix my signature in 110

2, so that it will support the raised standard 3 securely and obviate any liability of its being jolted out of place.

It will be understood that the spring 12 may be dispensed with, if desired, the hook 10 being capable of serving as a catch for the lever-handle 4, either with or without the aid of a spring.

With pivotal standards on both ends of the 10 bolsters, the operating-levers of the respective locking devices 4 will be arranged on opposite sides of the bolsters and will be extended a sufficient distance so that the unlocking of the standards on the right can be 15 effected from the left side of the car and the unlocking of the standards on the left be controlled from the right side of the car.

The locking and tripping devices described can be readily applied to any ordinary side-dump car or to log carriages, wagons, or other 20 vehicles provided with pivoted standards for retaining logs or other materials.

What I claim as my invention is --

1. The combination with the bolster having 25 in its end a vertical open-ended slot, and the standard pivoted in said slot, of a locking and tripping angle-lever fulcrumed at one side of the slot and having one arm adapted to extend across said slot to secure the lifted 30 standard, a two-part jointed operating-lever

connected with the other arm of said angle-lever, and means for securing the operating-lever to hold the angle-lever in place, substantially as described.

2. The combination with the bolster having 35 in its end a vertical open-ended slot, and the standard pivoted in said slot, of a locking and tripping angle-lever mounted on the bolster and having one arm adapted to extend across the bolster-slot outside the raised standard, 40 a two-part jointed operating-lever connected with the angle-lever, and a hook to secure the handle portion of the operating-lever, substantially as described.

3. The combination with the bolster having 45 a slot in its end, and a standard pivoted in said slot, of the locking and tripping angle-lever adapted to hold the standard in a raised position, the two-part jointed operating-lever 50 connected with the angle-lever, and the hook and spring for securing said operating-lever, substantially as described.

In testimony whereof I have hereunto set my hand in presence of two subscribing witnesses.

GEORGE W. WARNER.

Witnesses:

L. C. THOMPSON,
JOHN S. LATCH.

support the raised standard
 liable any liability of its be-
 place.

stood that the spring 12
 with, if desired, the hook
 of serving as a catch for the
 lever with or without the aid

standards on both ends of the
 lifting-levers of the respect-
 4 will be arranged on op-
 bolsters and will be ex-
 distance so that the un-
 standards on the right can be
 left side of the car and the
 standards on the left be on
 right side of the car.

tripping devices described
 applied to any ordinary side-
 carriages, wagons, or other
 with pivoted standards for
 other materials.

As my invention is—

tion with the bolster having
 an open-ended slot, and the
 in said slot, of a locking
 angle-lever fulcrumed at one
 end having one arm adapted
 said slot to secure the lifted
 part jointed operating-lever

connected with the other arm of said angle-
 lever, and means for securing the operating-
 lever to hold the angle-lever in place, sub-
 stantially as described.

2. The combination with the bolster having 35
 in its end a vertical open-ended slot, and the
 standard pivoted in said slot, of a locking and
 tripping angle-lever mounted on the bolster
 and having one arm adapted to extend across
 the bolster-slot outside the raised standard, 40
 a two-part jointed operating-lever connected
 with the angle-lever, and a hook to secure
 the handle portion of the operating-lever, sub-
 stantially as described.

3. The combination with the bolster having 45
 a slot in its end, and a standard pivoted in
 said slot, of the locking and tripping angle-
 lever adapted to hold the standard in a raised
 position, the two-part jointed operating-lever
 connected with the angle-lever, and the hook 50
 and spring for securing said operating-lever,
 substantially as described.

In testimony whereof I have hereunto set
 my hand in presence of two subscribing wit-
 nesses.

GEORGE W. WARNER.

Witnesses:

J. C. THOMPSON,
 JOHN S. LATCH.

And afterwards, to wit, on the 19th day of January, 1915, there was duly filed in said Court, and cause a Praecipe for Transcript, in words and figures as follows, to wit:

Praecipe for Transcript.

To the Clerk of the above entitled court:

You are requested to incorporate the following portions of the record in the transcript on appeal in the above entitled case: Complaint, answer, decree, statement of evidence with exhibits attached, order extending time for transmitting transcript on appeal to Feb. 1, 1915, Petition for and Order allowing appeal and undertaking, order directing original of plaintiffs' exhibits C. E. and F and of defendants' exhibit 6 to be transmitted, and assignment of errors.

STAPLETON & SLEIGHT and
JOS. L. ATKINS,

Attys for Plaintiffs.

Service accepted this 18th day of January, 1915.

W. R. LITZENBERG.

Filed January 19, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 19th day of January, 1915, there was duly filed in said Court, and cause, a Stipulation to send original exhibits to Court of Appeals, in words and figures as follows, to wit:

Stipulation.

It is hereby stipulated that the original of plaintiffs' exhibits C, E and F and of defendants' exhibits 6 may be transmitted to the Circuit Court of Appeals with the transcript herein, the same requiring the inspection of the court.

STAPLETON & SLEIGHT &
JOS. L. ATKINS,
Attys. for Plaintiffs.

W. R. LITZENBERG,
Attys. for defendants.

Filed January 19, 1915, G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 19th day of January, 1915, the same being the 68th Judicial day of the Regular November, 1914 Term of said Court; Present: the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

Upon stipulation of the parties, it is Ordered that the original of plaintiffs' exhibits C. E and F and of defendants' exhibit 6 be transmitted to the Circuit Court of Appeals with the transcript on appeal herein.

CHARLES E. WOLVERTON.
Judge.

Filed January 19, 1915, G. H. Marsh, Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in which Clayton T. Eaid and Joseph A. McConnell are Appellants, and Twohy Bros, Company, a corporation, The Northwestern Equipment Company, a corporation, and Elbert G. Chandler are Appellees, in accordance with the law and the rules of this Court, and in accordance with the praecipe of the appellant filed in said case, and that the said record is a full, true and correct transcript of the record and proceedings had in said Court, in accordance with said praecipe, as the same appear of record and on file at my office and in my custody;

And I further certify that the cost of the foregoing record is \$, for Clerk's fees for preparing the transcript of record and \$ for printing said record, and that the same has been paid by said appellants.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Portland, in said District, on the day of 1915.

Clerk.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CLAYTON T. EAID and JOSEPH A. McCONNELL
APPELLANTS

VS.

**TWOHY BROS. COMPANY, a Corporation,
THE NORTHWESTERN EQUIPMENT COMPANY,
a Corporation, and
ELBERT G. CHANDLER**
APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

Appellants' Brief

**RICHARD SLEIGHT,
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Attorneys for the Appellants

Filed

APR 19 1915

F. D. Monckton,
Clerk.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLAYTON T. EAID and JOSEPH A. McCONNELL,
Appellants,

vs.

TWOHY BROS. COMPANY, a corporation,
THE NORTHWESTERN EQUIPMENT
COMPANY, a corporation, and
ELBERT G. CHANDLER,
Appellees.

*Upon Appeal from the District Court of the
United States for the District of Oregon.*

Appellants' Brief

STATEMENT OF THE CASE

This is a suit in equity brought by the appellants as joint owners of U. S. Letters Patent No. 901815 issued October 20, 1908, to Joseph A. McConnell, upon Chock Attachment for Cars (Record, pp. 73-74).

Assignment of said patent by Joseph A. McConnell, patentee, one of the appellants, to the other appellant, Clayton T. Eaid, duly proven (Record, pp. 30-31) is shown on pages 75-76 of Record.

Appellees deny infringement, but admit in their answer (Record, p. 13) the manufacture and sale of "Log Bunk as fully illustrated, described and claimed" in U. S. Letters Patent No. 1066795, issued July 8, 1913, to Elbert G. Chandler, one of the appellees.

The manufacture of chocks under the said Chandler patent is moreover admitted by counsel for appellees (Record, p. 37).

The one question raised, and that by the pleadings, may be stated as follows:

Does the manufacture and sale of the subject matter described and claimed in the Chandler patent, aforesaid, constitute infringement of the McConnell patent of record (see Record, bottom p. 36 and top p. 37).

ASSIGNMENT OF ERRORS

I.

In decreeing that the plaintiffs are not entitled to the relief prayed for in the complaint.

II.

In decreeing that the McConnell patent set forth in the complaint and therein sued upon is not infringed by the structures and log bunks manufactured by the defendants.

III.

In decreeing that the plaintiffs were not entitled to an injunction restraining defendant from continuing to manufacture or sell said structures and log bunks manufactured by them under the Chandler patent.

IV.

In decreeing that the subject matter of the Chandler patent is substantially different from that defined in the claims of the McConnell patent, severally.

V.

In decreeing that the Chandler device is a marked advance upon the McConnell device.

VI.

In failure to recognize the prior state of the art upon which the McConnell patent is predicated.

VII.

In failure to ascribe to the McConnell patent its proper relationship to the prior art.

VIII.

In failure to allow to the McConnell patent the full benefit and scope of the language of the claims in construing the same.

IX.

In denying to the McConnell patent that liberal interpretation to which it is entitled under the law.

X.

In failure to extend the application of the doctrine of equivalents to the claims of the McConnell patent, *seriatim*, in determining their scope.

XI.

In reading into claim 1, line 6 of the McConnell patent a comma after the word "only" where none appears in the patent.

XII.

In limiting the construction of claim 1 of the McConnell patent upon the interpolation of a comma after the word "only" in line 6 thereof.

BRIEF OF LAW

CONSTRUCTION OF PATENT IN SUIT.

Where the language employed in the specification of a patent is clear and unambiguous, it must speak its own construction.

Mitchell v. Tilghman, 19 Wall. 287.

Patents for inventions are to receive liberal construction, to uphold and not to destroy the right of the inventor.

Winans v. Denmead, 15 How. 330.

Claims of a patent not held to literal interpretation.

Hoyt v. Horne, 145 U. S. 302.

Infringement sometimes made out though letter of the claims be avoided.

Westinghouse v. Boyden Power Brake Co.,
170 U. S. 537. Authorities cited.

Patent *prima facie* evidence that patentee is the original and first inventor.

Mitchell vs. Tilghman, 19 Wall. 287.

Patent *prima facie* evidence of novelty and utility.

Cammeyer vs. Newton, 94 U. S. 225.

The reasonable presumption is that, having a just right to cover and protect his whole invention, the patentee intended to do so.

Haworth vs. Hardcastle, Webster P. C. 484,
cited in Winans vs. Denmead, 15 How. 330.

When claims are fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention.

McClain vs. Ortmyer, 141 U. S. 419.

The presumption is that an inventor intends to protect his invention broadly, and consequently the scope of a claim should not be restricted

beyond the ordinary meaning of the words, save for the purpose of saving it.

Andrews vs. Nilson, 27 App. D. C. 451.

Reference to the specification and drawings to be made in construing claims.

Bates vs. Coe, 98 U. S. 31-50.

But only for the purpose of enabling the Court correctly to interpret the claim.

Brooks vs. Fiske, 15 How. 215.

~~///~~ "Means" broad term

includes singular or plural number.
Need Mfg. Co., vs. Smith & Winchester Co.,
123 Fed. 878. Any mechanism that will , 215.
accomplish the result. Natl. Mach.

Directory Co., vs. Polk, 58 C.C.A. 24 ART.
[9th Cir.] Where the hand of the oper-
ator assists in operation. Need Mfg.

Co., vs. Smith Winchester Co., knowledge, a
123 Fed. 878. 59 C.C.A. 366. f the prior art

on the question of the validity of a patent in
suit, unless the prior art is in evidence.

Stafford vs. Morris, 161 F. 113.

State of art may limit but not defeat a patent.

Imp. Bottle Cap & Mach. Co. vs. Crown Cork
& Seal Co., 139 F. 312.

Patents not set up in answer may be introduced
to show prior art, but not to invalidate patent for
want of novelty.

Grier vs. Wilt, 120 U. S. 412.

PRINCIPLE OF INVENTION.

Principle is mode of operation.

Burr vs. Duryee, 1 Wall. 531.

An inventor must describe what he conceives to be the best mode of applying the principle of his invention, but he is not confined to that. The principle of an invention is a unit and invariable; the modes of its embodiment in the concrete invention may be numerous, and in appearance very different from each other.

Continental Paper Bag Co. vs. Eastern Paper Bag Co., 210 U. S. 405.

All modes, however changed in form, but which act on the same principle and effect the same end, are within the patent; otherwise a patent might be avoided by anyone who possessed ordinary mechanical skill.

McComb vs. Brodie, Fed. Cas. 8708.

After the patentee has fully described his invention, shown its principles, and claimed it in a form which perfectly embodies it, unless he disclaims other forms, he is deemed in law to claim every form in which his invention may be copied.

Murphy vs. Eastham, Fed. Cas. 9949.

Winans vs. Denmead, 15 How. 343.

That is called "principle" in a machine which

applies, modifies or combines mechanical powers and produces a certain result.

Smith vs. Pearce, Fed. Cas. No. 13089.

Where an invention is developed in different and independent forms, all original, and yet all bearing a somewhat general resemblance to each other, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly and subjects them to tribute.

Chicago & N. W. R. Co. vs. Sayles, 97 U. S. 554.

Bona fide inventors of a combination may suppress every combination not substantially different from what they have invented and patented.

Seymour vs. Osborne, 11 Wall. 516.

When a party has invented some mode of carrying into effect a law of natural science or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of the invention. He is entitled to protect himself from all other modes of making the same application; and every question of infringement will present the question, whether the different mode, be it better or worse, is in substance an application of the same principle.

Sewall vs. Jones, 91 U. S. (1 Otto) 171-199.

McCONNELL PATENT A PIONEER

A pioneer patent is one which first discloses means to accomplish a certain result.

Natl. Dump Car Co. vs. Ralston Steel Car Co.,
172 F. 393.

A primary invention is "one which performs a function never performed by any earlier invention."

Western Electric Co. vs. Robertson, 142 F.
471.

Dictum: "We recognize, however, that the distinction between primary and secondary patents is now given less force than formerly by the courts, for EVERY PATENT MAY BE REGARDED AS PRIMARY WITHIN ITS FIELD; and it follows, then, that every patent should have as broad an interpretation as the courts may fairly give it, and as full and fair a use of the doctrine of equivalents as the Court may fairly allow it."

Kip-Armstrong Co. vs. King Phillip Mills, 130
F. 28.

DOCTRINE OF EQUIVALENTS.

Substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself.

Cochran vs. Deener, 94 U. S. 780.

Union Paper Bag Machine Co. vs. Murphy,
97 U. S. 120.

If two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, though they differ in name, form or shape.

Union Paper Bag Mach. Co. vs. Murphy, 97 U. S. 120.

A patentee is protected against equivalents for any part of his invention, whether he has claimed them or not.

Goodyear Vulcanite Co. vs. Davis, 102 U. S. 222.

In construing patents, the doctrine of mechanical equivalents is applicable to claims for combinations of old elements, and improvements on primary inventions, as well as to claims for primary inventions themselves.

Tatum vs. Gregory, (C. C.) 41 Fed. 142.

Where an inventor is entitled to the benefit of the doctrine of equivalents it is not essential that the equivalent does the same work in precisely the same way. It is sufficient that it accomplish the same result in substantially the same way.

Westinghouse Elec. & Mfg. Co. vs. Condit Elec. Mfg. Co., 158 F. 144.

Known equivalent is a known device substituted to effect the same result.

Morley Sewing Mach. Co. vs. Lancaster, 129 U. S. 263.

Every meritorious inventor entitled to benefit of the doctrine of equivalents according to amount of invention embodied in patent.

Commercial Acetylene Co. vs. Avery Portable Lighting Co., 166 F. 907.

The broader the invention the broader the range of equivalents.

Clark vs. Geo. Lawrence Co., 160 F. 512.

A patentee is entitled to the protection of the doctrine of equivalents in proportion to the nature of the advance which his invention indicates.

Continental Paper Bag Co. vs. Eastern Paper Bag Co., U. S. 210, 415-417.

American Can Co. vs. Hickmott Asparagus Canning Co., 142 F. 141.

Columbia Wire Co. vs. Kokomo Steel & Wire Co., 143 F. 116.

Though some of the corresponding parts of the machinery, designated in this combination, are not the same in point of form * * * and, separately considered, could not be regarded as identical or conflicting, yet having the same purpose in the combination, and affecting that purpose in substantially the same manner, they are the equivalents of each other in that regard.

Cochran vs. Deener, 94 U. S. 780.

See Evans vs. Eaton, 1 Robb. Pat. Cases 193.

FUNCTIONAL CLAIMS.

Definition of invention by function not patentable.

Burr vs. Duryee, 1 Wall. 531.

INFRINGEMENT.

In an action for infringement, the first question is, whether the machine used by the defendant is substantially in its principle and mode of operation, like the plaintiff's. If so, it is an infringement to use it.

Sewall vs. Jones, 91 U. S. (1 Otto) 171-199.

Where a patent is for means devised to produce a result, in an action for infringement the question is whether the defendants use the same or equivalent means.

Ives vs. Hamilton, 92 U. S. 426.

Neither multiplication or division of parts—joinder or separation—of elements will avoid infringement.

Nathan vs. Howard, 143 F. 889.

Lidgerwood Mfg. Co. vs. Lambert Hoisting Engine Co., 150 F. 364.

Where form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the

form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement; and it is not a defense, that it is embodied in a form not described, and in terms claimed by the patentee.

Winans vs. Denmead, 15 How. 343.

To infringe a patent, it is not necessary that the thing patented should be adopted in every particular. If the patent is adopted substantially by the defendants they are guilty of infringement.

Sewall vs. Jones, 91 U. S. (1 Otto) 171-199.

A patent for a combination is infringed by the use of a similar combination, although one of the elements is omitted and another substituted for it, unless the substituted device is a new one, or was not known at the date of the patent as a proper substitute for the one omitted.

Seymour vs. Osborne, 78 U. S. (11 Wall.) 516.

When the invention is embodied in a machine, the question of infringement is best determined by a comparison of the machine made by the respondent with the mechanism described in complainant's patent.

Blanchard vs. Putnam, 8 Wall. 426.

Seymour vs. Osborne, 11 Wall. 559.

Bates vs. Coe, 98 U. S. 31-50.

Actual inventors of a combination of two or more ingredients of a machine secured by letters patent in due form are entitled, even though the ingredients are old, if the combination produces a new and useful result, to treat every one as an infringer who makes and uses or vends the machine to others to be used without their authority or license.

Seymour vs. Osborne, 11 Wall. 559.

CHANDLER PATENT NO DEFENSE.

It is no defense in infringement proceedings to show that the infringing device was made in accordance with a later patent.

Blanchard vs. Putnam, 8 Wall. 420.

Electric Candy Mach. Co. vs. Morris, 156 F. 972.

A device is none the less an infringement because it contains an improvement upon the patented invention.

Elizabeth vs. American Nicholson Pav. Co.,
97 U. S. 126. **Westinghouse vs. Boyden**
Co., 170 U.S. 568-569.

A substantial equivalent of a patented device or means which performs the same function does not avoid infringement because it may perform an additional function.

Universal Brush Co. vs. Sonn, 146 F. 517.

Comptograph Co. vs. Mechanical Accountant Co., 140 F. 136; 145 F. 331.

The mere change of location of a joint in a machine, which does not change the substantial identity of the thing, or its operation and effect, does not prevent its use from being an infringement.

Brown vs. Guild, 23 Wall. 181.

To same effect, with enlarged particularity.

Whitely vs. Kirby, 11 Wall. 32.

One invention may include within it many others, and each and all may be valid at the same time. This only consequence follows: That each inventor is precluded from using inventions made and patented prior to his own, except by license from the owners thereof.

Cochrane vs. Deener, 94 U. S. 780.

A new idea may be engrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case, it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former.

Smith vs. Nichols, 21 Wall. 112.

Presumption of patentable difference raised by a subsequent patent does not exclude the fact that the later patent may embody things which are the exclusive property of the complainant under a prior patent.

Electric Candy Machine Co. vs. Morris, 156 F. 972.

If one has taken the same plan and applied it to the same purpose, notwithstanding he may have varied the process of the application, his manufacture will be substantially identical with that of the patentee.

Sewall vs. Jones, 91 U. S. 171-199.

To like effect as foregoing see

Stebler vs. Riverside, 205 F. 735, and authorities collected therein.

BRIEF OF FACTS

THE McCONNELL PATENT.

This patent (see Record, p. 73) describes and purports to cover in broad terms a chock attachment for cars, otherwise known as a logging bunk, designed for the purpose of holding logs or timbers upon a car against dislodgment in transportation.

So far as relates to the present controversy, the patentee sets forth the object of this invention broadly to be, "to provide novel means whereby chocks can be moved into lowered position." The term "means" is one recognized to be of the broadest scope (*Eastern Paper Bag Co. vs. Continental Paper Bag Co.*, 142 Fed. Rep. 479) and is employed without limitation not only in the claims, but in setting forth the object of the invention (*McConnell Specification*, p. 1, line 17).

Moreover, the invention is defined as consisting "of certain * * * combinations of parts (as) described and pointed out in the claims." (McConnell Specification, p. 1, lines 26 to 29.)

In respect to the form of embodiment of the invention described, it should be observed that it is presented preferentially only. (McConnell Specification, p. 1, line 31.)

The claims of the patent are ten in number, but infringement is not charged against the defendants in respect to claims 7, 8 and 9, and they may therefore be dismissed from consideration in this case.

In respect to all of the claims, the entity defined by each is described as "comprising" certain elements. The term "comprising" is recognized in patent practice to be of broad scope as contradistinguished from the term "consisting of," for example. The enumeration of elements called for under the latter term must be a complete enumeration, whereas under the former the enumeration is not inclusive of all, but only of so many as are necessary to constitute an operative whole.

Of the seven claims involved in this suit, the tenth claim is the broadest, and for that reason in the following analysis the tenth claim will be considered first, and the remaining claims in their order.

O'Leary
Utica,
139 Fed

Krajewski
vs. Pha
105 Fed
Smith v
Perkins
Fed. 285

McCONNELL'S 10TH CLAIM.

The tenth claim of the McConnell patent defines a combination comprising the following three elements, to-wit:

Standard
Dictionary

A wedge = 1. A chock.

2. Stop devices.

~~///~~

3. Means for lowering the chock to disengage it from said devices.

Element 2 is described as "for engagement with the chock when in one position," and element 3 is followed by the words "and for sliding the chock while in lowered position." The language of the claim in respect to language not included in the above analysis of elements 2 and 3 is of functional description only, and does not limit the scope of the claim. Functional description following an element may, in case of need to support a claim by differentiation from the prior art, be construed to qualify the element, but in the present case there is no such need and no necessity for any limitation of the three elements as enumerated, imposed either by the language of the patent or by the state of the prior art. Moreover, no construction which might be placed upon this claim in its entirety would, in this instance, be consequential.

The language of claim 10 is clear and concise, and unmistakably defines the invention in broadest scope. In respect to its first two elements, it postulates the presence in the combination of

two elements that are absolute essentials in any conceivable form of logging bunk. The language is broad enough to include any device of the prior art set up or even the wagon bolster, of use so common as to justify the Court in taking judicial notice of it under the authority of *Brown vs. Piper*, 91 U. S. 37.

Its matter is clearly differentiated by inclusion of the element 3, to-wit: "Means for lowering the chock to disengage it from said devices." It would not be possible to select a term broader or one more apt to define that element of indisputable novelty which lends patentability to the combination.

McCONNELL'S 1ST CLAIM.

Claim 1 defines a combination comprising the following elements, to-wit:

1. Parallel beams.
2. Means for securing the beams to a car platform.
3. Oppositely disposed chocks pivotally and movably mounted between the beams.
4. Fixed means for engaging the chocks when elevated.
5. Means carried by the beams for actuating the chocks.

Let it be observed that elements 2, 4 and 5 are couched in that broadest of terms "means." (*Vide* *O'Reilly vs. Morse*, 15 How. 62, and *Eastern*

Re necessity for differentiation of claims:
de Ryder vs. Schlichter, 126 Fed. 487.
Myer vs. Kellar Tool Co., 127 Fed. 130.
Winfield vs. Fatts, 126 Fed. 475.
Tomson-Houston vs. Nassau Elec. Co., 110 Fed. 647.
 See Page 21.

Paper Bag Co. vs. Continental Paper Bag Co.,
142 F. 478.) Element 4 is restricted only by
the single qualification that the means must be
fixed. The statement "only to hold them against
sliding in one direction" is of function only. It
illustrates the definition of the combination covered
by the claim, but is required by no limitation
imposed by the language of the specification,
or by the prior state of the art. #

ERROR IN CONSTRUING CLAIM 1.

The Court below committed the error as set
forth in paragraphs XI and XII, Assignment of
Errors (Record, pp. 25-26), in reading into line 6
of the claim now under consideration a comma
after the word "only." Such reading imposes a
limitation upon the claim which the patent does
not contain, and which the prior state of the art
does not impose. Interpolation of the said comma
makes the adverb "only" to qualify the preceding
verb "elevated" instead of the succeeding
verb "to hold." Neither the utility of the device,
as is clear in view of the Chandler patent, nor the
prior state of the art demands that the fixed
means for engaging the chocks, when elevated,
shall engage them only when elevated. The
words "only to hold them against sliding move-
ment in one direction" cause the language of the
claim to harmonize with the demands of utility
and to supply the utmost differentiation which
the state of the art might require.

Nevertheless, the fact remains that under any
possible construction that may be placed upon the
words last above quoted, - wherever they appear -
the meaning is clear that the "fixed means" to
which they refer effect operative engagement with
the chocks only when the chocks are elevated.

The construction adopted by the Court below does violence to the patent, by narrowing the claim in disregard of the principle of law laid down by the Supreme Court in *McClain vs. Ort-mayer*, 141 U. S. 419, and enforced by the pre-sumption recognized in *Andrews vs. Nilson*, 27 App. D. C. 451.

It denies to appellant that liberal construction of his patent to which it is entitled under *Winans vs. Denmead*, 15 Howard 330, whose authority is unquestionable.

McCONNELL'S 2ND CLAIM.

Claim 2 defines a combination comprising the following elements, to-wit:

1. Beams.
2. Combined stop and guide devices fixedly carried thereby.
3. Chocks pivotally and slidably mounted within said devices.
4. Means carried by the chocks for engaging the devices.
5. Means carried by the beams for actuating the chocks.

The functional statement following element 4 is found in this claim substantially as in claim 1.

McCONNELL'S 3D CLAIM.

Claim 3 defines a combination comprising the following elements, to-wit:

Actuating "-definition Century Dictionary, 1889
 page 63. "Actuate, I, to move or incite to action"
 an electromagnet actuates an armature [example
 usage quoted], See also under "Syn."

1. Beams.
2. Combined guide and stop devices carried thereby.
3. Chocks pivotally and slidably mounted within said devices.
4. Means integral with the chocks for engaging the devices.
5. Separate means for elevating the chocks.

See "elevate"
as in gun-
nery, Stand-
ard Dictionary.

words "to limit the movement of the s in one direction" follow element 4. This age is of functional description, but could e, by any possibility, construed to limit the scope of the claim, inasmuch as limitation of movement in one direction does not preclude limitation of movement in more than one direction, if for any reason such limitation were desirable. The word "only" is omitted from the language following element 4 in this claim. Element 5 of this claim is believed to be, in view of the prior state of the art, entitled to a construction broad enough to include separate means for *keeping* the chocks elevated. It is true that this element is susceptible of a narrower construction if the state of the art demanded it, but the narrower construction is not imposed by the state of the prior art, and the nature of the invention warrants the broader construction. (See McClain vs. Ortmyer, 141 U. S. 419, and Arbetter vs. Lewis, 34 App. D. C. 491.)

McCONNELL'S 4TH CLAIM.

Claim 4 defines a combination comprising the following elements, to-wit:

1. Beams.
2. Combined guide and stop devices fixedly carried thereby.
3. Chocks pivotally and slidably mounted within said devices.
4. Means integral with the chocks for engaging the devices.
5. Means extending toward one end of the beams for actuating the chock adjacent to the other end thereof.

In the claim after its fourth element, the following functional statement appears: "Only when the chock is raised to limit the sliding movement of the chocks in one direction." There is obvious inadvertence in the use of the singular term "chock is" instead of the plural term, and the words are substantially equivalent to the functional statement in claim 3. The function called for is one required only when the chock is raised.

The five claims above reviewed define within their respective scopes the novelty of McConnell's invention.

The true meaning of those claims may be the more readily apprehended from a review of that summary of the novelty, utility and "principle"

of the invention presented elsewhere in this brief under section entitled, "*McConnell a pioneer inventor*," and to that section reference is here made.

McCONNELL'S 5TH CLAIM.

Claim 5 defines a combination comprising the following elements, to-wit:

1. Beams.
2. A chock pivotally and slidably mounted between the end portions thereof.
3. A shaft journaled within the beams.
4. A crank arm carried thereby.
5. A link connection between said arm and chock.
6. Means co-operating with the chock for limiting its movement in one direction.

The claim also contains the following functional statement: "Said crank arm and link being disposed to lock the chock in an elevated position."

McCONNELL'S 6TH CLAIM.

Claim 6 defines a combination comprising the following elements, to-wit:

1. Beams.
2. A shaft journaled therein.
3. Chocks pivotally and slidably mounted between the beams.

Definition: Link, 3. Any constituent part of a connected series." Century Dictionary, 1889, page 3468.

"Connection 1: Union by junction --- or by order of a series, Ib. page 1199.

4. Means co-operating with the chocks, for limiting the movement of each chock in one direction.

5. An arm upon each shaft.

6. A link connection between said arm and one of the chocks.

7. Crossed oppositely extending means for actuating the shafts.

This claim contains the functional description relative to elements 5 and 6, as follows: "Said arm and connection being disposed to lock the chocks in an elevated position."

STATE OF THE PRIOR ART.

The patent in suit, to-wit, McConnell No. 901895, issued upon application filed January 24, 1908. (Plaintiff's Exhibit A, Record, p. 73.)

The subsisting state of the prior art at that date is exhibited in U. S. Letters Patent No. 513124, C. D. Matheny, January 23, 1894. (Defendants' Exhibit 7, Record, p. 93.)

U. S. Letters Patent No. 790915, T. D. Parsons, May 30, 1905. (Defendants' Exhibit 8, Record, p. 95.)

U. S. Letters Patent No. 770899, M. Foshee, September 27, 1904. (Defendants' Exhibit 9, Record, p. 97.)

In addition to the prior art as set forth above, counsel for appellees also offered in evidence (Record, p. 71) Defendants' Exhibit 10, Defend-

ants' Exhibit 11, and Defendants' Exhibit 12. The offer was objected to upon the ground that none of the patents constituting said exhibits were certified or authenticated, and the Court below sustained the objection.

Introduced in the manner and at the time in which they were offered Defendants' Exhibits 10, 11 and 12 would, even without objection, be entitled to little, if any, consideration.

Charmbury vs. Walden, 141 F. 373.

Bell vs. Mackinnon, 149 F. 205. 255

Benbow Brammer Mfg. Co. vs. Heffron Tanner Co., 144 F. 429.

It is proper to add, however, that even the said Exhibits 10, 11 and 12 disclose no material addition to the state of the art.

Touching the art as shown of record, the earliest and the most pertinent contribution thereto is found in the Matheny patent (Defendants' Exhibit 7, Record, p. 93). That patent shows the only pivoted and transversely adjustable chock prior to the McConnell application. During the period of some fourteen years which elapsed between the date of issue of the Matheny patent and the McConnell application, no advance was made in the art in the direction of a pivoted and adjustable chock.

The Parsons patent (Defendants' Exhibit 8, Record, p. 95) shows an adjustable sliding block but neither a pivoted nor a depressible chock.

The Foshee patent (Defendants' Exhibit 9, Record, p. 97) shows a pivoted but non-adjustable bolster.

So far as appears Matheny's was no more than a paper patent, and his device never went into actual use in the art. The reason is not far to seek, but will be apparent, it is believed, from an examination of the patent, in view of the next paragraph.

Adverting only cursorily to the impracticable and inefficient means that support the chock C in the Matheny patent, to-wit, the strut C' and slotted plate S, the attention of the Court is particularly invited to the fact that MATHENY'S CHOCK C IS NOT ADAPTED TO DO THE WORK REQUIRED IN THE ART OF A TRANSVERSELY ADJUSTABLE CHOCK.

It is adjustable theoretically and on paper, but not practically. This statement, however extreme it may appear, is emphatically made in order to challenge contradiction, and will be found to be amply supported by the evidence, upon consideration, particularly, of Fig. 4 of the Matheny patent. From that figure, in view of the specification, it will be seen that the chock C cannot be adjusted when it is in the depressed position, but can be adjusted only when its strut or brace C' is lifted not only clear of the plate S, but also clear of the web that is superimposed above the plate S. Consequently the bunk or cross-pieces, upon which the logs in service rest, must be clear of logs in order to admit of proper adjustment of

the chocks C thereof. Now this condition is fatal to the use of the Matheny device in practice, because it is only when the logs are loaded in place upon the bunks that adjustment can be effected to any practical advantage.

It is this fatal defect in the Matheny device which McConnell overcomes, by a departure in principle from the Matheny invention, and that only after a lapse of some fourteen years, and when the Matheny patent had wellnigh expired.

It was in order to provide for the safe loading, transportation and unloading of the largest and heaviest logs that the art developed a demand for a pivoted, transversely adjustable, practicable chock. Matheny evidently conceived that a transversely adjustable pivoted chock would be desirable in the art, but he did not discover one which would work in practice. His position in the art is analogous to that of the unfortunate would-be inventor who conceives the existence of a demand for an improvement in an art, but who falls short of arriving at means for satisfying that demand.

McConnell was the first to produce a practicable, pivoted, transversely adjustable chock, and his improvement lies at the root of every improvement in that branch of the art that has followed after him. His invention is broadly a pivoted chock which may be adjusted while it is in the depressed position. By aid of such means he was the first one enabled to load a car with

logs or a single log and then to set the chocks, the same being pivoted, into snug contact with the load, thereby combining security in transportation with safety and facility in unloading.

In fine, McConnell is beyond question an absolute pioneer in a most important branch of the art.

McCONNELL A PIONEER INVENTOR.

The record shows that McCONNELL was the FIRST TO PRODUCE A LOGGING BUNK, of distinct utility, comprising a bed, as of parallel beams, designated by the numeral 3 of the drawing, in combination WITH STOP DEVICES AND PIVOTAL CHOCKS ADJUSTABLE lengthwise of the beams, AND ADAPTED TO BE RAISED and secured in position for the purpose of holding logs, OR TO BE LOWERED FOR THE PURPOSE OF ADJUSTMENT.

He was also the FIRST TO PRODUCE, in such a device, "MEANS BY LOWERING THE CHOCK TO DIS-ENGAGE IT FROM ITS STOP DEVICES."

He was also the FIRST TO PRODUCE, in such a device, "MEANS FOR LOWERING THE CHOCK IN ORDER TO SLIDE IT WHILE IN LOWERED POSITION."

He was also the FIRST TO PRODUCE, in such a device, "FIXED MEANS FOR ENGAGING THE CHOCKS WHEN ELEVATED."

He was also the FIRST TO PRODUCE, in such a device and for sliding the chocks, "COMBINED STOP AND GUIDE DEVICES FOR THE CHOCKS."

The language of the present section of this

brief points out broadly that which McConnell owned by clear right of discovery on January 24, 1908, when he made his application for patent. It was his clear right to make his claims within that scope, and that right, it is maintained, he has neither surrendered nor curtailed.

See *Winans vs. Denmead*, *supra*, 15 How. 330.

COMPARISON OF McCONNELL AND CHANDLER PATENTS.

Analysis and comparison of the McConnell and Chandler patents is facilitated by the parallel column arrangement subjoined, the reference numerals in the respective columns being those employed in the specifications of the respective patents.

The analysis of the McConnell patent presented above is followed in the comparison submitted below.

With reference to claim 10 of the McConnell patent:

McConnell Patent

1. "A chock" represented by the members 17 and 21.

2. "Stop devices" represented by the ratchet bars 15 and trunnions 18 provided with shoulders 20.

3. "Means for lowering the chock to disengage it from said devices" are represented by wrist pin 24, link 22, crank arm 25, shaft 5, arm 6, and operating bar 8.

Chandler Patent

1. "A chock"=9.

2. "Stop devices" = trunnions 10 and notched bracket members 6.

3. "Means for lowering the chock to disengage it from said devices"=lip 11 on the chock, the co-operative swinging member 12, and offset 15 upon the operating rod 13.

"Stop devices," called for as element 2 in claim 10 of the McConnell patent, are defined in the claim as being "for engagement with the chock when in one position." Even conceded that the Chandler stop devices make engagement in all positions, it follows therefore, of course, that they engage in any one position. The words "for engagement with the chock when in one position" therefore have no effect of limitation, but the contrary.

The stop devices shown in the Chandler patent are the trunnions 10 which engage and are held by the notches of the brackets 6. The slide of the trunnions 10 over the notches of the brackets 6 is substantially identical with the slide of the McConnell chock, the only difference being that the McConnell chock slides in a straight line, and the Chandler slides in an undulatory line (see Record, Expert testimony, p. 61).

There is, no doubt, advantage in the straight slide of the McConnell chock, and that is accomplished by the addition, in the McConnell device, to the shouldered trunnions 18, of ends projecting above the shoulders 20 so as to enter the opposite channeled guides 16 provided for their reception and guidance. The only difference obtained by Chandler in this respect is retrogressive in its nature, and is attained by the omission of the projecting ends of the McConnell trunnions 18 and their guide channels 16, with consequent loss of function. Without said pro-

jecting ends the McConnell chocks would be substantially identical, both in form and sliding movement, with the Chandler chocks.

It is demonstrable and will be shown to the Court, that the McCONNELL CHOCKS are as COMPLETELY OPERATIVE WITHOUT THE PROJECTING ENDS OF THE TRUNNIONS 18 as with them. *HP*

The uncontradicted testimony of a qualified and unquestioned expert is presented in support of the proposition, if any support were necessary, that the subject matter defined in the Chandler patent is in its several parts the substantial mechanical equivalent in every respect of the several elements called for in the combination defined in claim 10 of the McConnell patent. (See testimony of Clinton F. Blake, Record, p. 51.)

INTERCHANGEABILITY.

In *Miller vs. Eagle Mfg. Co.*, 151 U. S. 186, it is held that the interchangeability or non-interchangeability of the two devices in question is an important test in determining the question of infringement. In the face of this authority it is important to note the uncontradicted testimony of the expert Blake showing the entire interchangeability of the Chandler with the McConnell construction. (See Record, p. 61.)

Element 3 of claim 10 of the McConnell patent is couched in the broadest possible terms. The practice of the Patent Office is well defined. *Ex parte Halfpenny*, 73 O. G., p. 1135, allows the

use of the broad term "means," or "mechanism," qualified by words descriptive of its function, when the state of the prior art warrants the use of so broad a term and not otherwise.

A claim broadly drawn will be broadly read.

Ex parte Cutler, C. D. 1906, 249.

Limitation of a claim by mere interpretation or construction condemned.

Briggs vs. Lillie *et al.*, C. D. 1905, 168.

The granting of claim 10, in particular, with the element 3, defined as it is in the patent, is therefore evidence of the broad intent and scope of the patent.

The position is moreover held that the complete definition of the third element of claim 10 is found in the words "means for lowering the chock to disengage it from said devices," and that the words following, "and for sliding the chock while in lowered position" are not only not definitive of a difference of function but are mere surplusage, being descriptive only of the operation which may ensue upon the lowering of the chock.

Analogous to point decided *ex parte* Holder, 1903 C. D. 442.

Adverting to the prior state of the art, and particularly to the Matheny patent set up therein, the same showing the first and only transversely adjustable pivoted chock known to the prior

art, it will be found that Matheny shows elements 1 and 2 of claim 10 of the McConnell patent, but fails to anticipate the combination defined in said claim for lack of element 3. As is elsewhere pointed out in this brief, Matheny's chock, although pivoted and ostensibly adjustable, is locked in place when lowered and must be lifted almost vertically in order to disengage it from its stop devices. This, as will be shown at the hearing, is fatal to the practical utility of the MATHENY BUNK, because it PROHIBITS ADJUSTMENT OF CHOCK ON THE BUNK WHEN LOADED. Any transverse adjustment except to accommodate a load in place on the bunk is A FUTILITY IN THE ART.

This proposition is advanced, under Assignment of Error, V, in contravention of the finding of the Court below, that the Chandler device is a marked advance upon the McConnell device. (See Record, p. 21.)

Disengagement of the chock from the stop devices referred to in element 3 is operative disengagement, or in other words, such disengagement as will when effected admit of the sliding of the chock in the lowered position. The nature of the disengagement is aptly described in the testimony of the expert Blake (Record, p. 59), where he says, "When the chock in the Chandler patent is lowered, while it is true that the trunnions 10 would still rest on the corrugations, it would be disengaged to the extent that it would

(could) then be moved—it is still engaged with the piece 6 but not in an operative sense, in the same manner that it was before.”

Despite denial that the language employed tends at all to limit claim 10, see

Arbetter vs. Lewis, 34 App. D. C. 491.

Analysis and comparison of the McConnell and Chandler patents with reference to claim 1 of the McConnell patent:

McConnell Patent

1. Parallel beams=3.
2. Means for securing the beams to a car platform=**beams 3 in connection with bolts 2.**

3. Oppositely disposed chocks pivotally and movably mounted between the beams=17—21.

4. Fixed means for engaging the chocks when elevated=ratchet bars 15.

5. Means carried by the beams for actuating the chocks=the same as those described in analysis and comparison with reference to claim 10, *supra*, under “McConnell Patent.”

Chandler Patent

1. Side pieces 1 and 2.
2. Side pieces 1 and 2 in connection with additional means implied.

(See testimony C. F. Blake, Record, p. 53.)

3. Chocks 9.

4. Bracket members 6.

5. The same as those described in analysis and comparison with reference to claim 10, *supra*, under “Chandler patent.”

The functional language of claim 1 of the McConnell patent has been referred to under “McConnell’s 1st claim,” *supra*, and need not be here repeated.

It is submitted, in view of the foregoing, that the Chandler construction reads upon claim 1 of the McConnell patent element for element with the sole exception of element 5, in which a colorable variation only of the means called for by McConnell is resorted to by Chandler.

Furthermore, it is submitted that the said variation is clearly colorable only in that it embodies elements well known and of familiar use at the time McConnell made his application for patent, and that they do the same work in substantially the same way and accomplish substantially the same result. (Union Paper Bag Mach. Co. vs. Murphy, 97 U. S. 120.)

The said means are under the authority last cited, submitted to be the same.

See also testimony Expert Blake, Record, pp. 51-52.

A like comparison of each of the remaining claims alleged to be infringed might be made, to correspond with that submitted with respect to claims 10 and 1, and all leading to the conclusion that the Chandler construction infringes the McConnell patent throughout, so far as alleged. It is believed, however, to be sufficient, in this brief, to refer to the careful analysis submitted of McConnell's claims 2, 3, 4, 5 and 6 respectively, and leave to the Court the comparison thereof with the Chandler construction.

Now, "an infringement involves substantial identity, whether that identity be described by the terms, 'same principle,' same 'modus operandi,' or any other. It is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way." Curt. Pat., 322.

Quoted with approval *Burr vs. Duryee*, 1 Wall. 531.

Upon the foregoing, comparison of the subject matter of the Chandler patent with the McConnell patent, in view of the prior art, discloses the fact, it is submitted, that Chandler employs a device but slightly changed even in form from the McConnell construction, to do the same work, in substantially the same way, and to accomplish substantially the same result. The Chandler device must therefore be held to come within the principle of the McConnell invention and to constitute an infringement of the McConnell patent.

Union Paper Bag Machine Co. v. Murphy,
97 U. S. 120.

Seymour v. Osborne, 11 Wall. 516.

Westinghouse v. Boyden P. B. Co., 170 U.
S. 537.

Respectfully submitted,

JOSEPH L. ATKINS,
Of Counsel for the Appellants.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CLAYTON T. EAID and JOSEPH A. McCONNELL
APPELLANTS

VS.

TWOHY BROS. COMPANY, a Corporation
THE NORTHWESTERN EQUIPMENT COMPANY,
a Corporation, and
ELBERT G. CHANDLER
APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

Appellees' Brief

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Filed

MAY 3 - 1915

F. D. McConnell,



IN THE
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CLAYTON T. EAID and JOSEPH A. McCONNELL,
Appellants

vs.

TWOHY BROS. COMPANY, a Corporation,
THE NORTHWESTERN EQUIPMENT COM-
PANY, a Corporation, and
ELBERT G. CHANDLER,
Appellees.

Upon Appeal from the District Court of the United
States, for the District of Oregon.

Appellees' Brief

APPELLEES' STATEMENT OF THE CASE.

The sole question involved in this suit is: Does a log bunk, built under U. S. Patent No. 1,066,795, issued July 8, 1913, to Elbert G. Chandler, one of the defendants herein (Page 77 of the Record), infringe U. S. Patent No. 901,815, issued to Joseph A. McConnell, October 20, 1908 (Page 73 of the Record), and a one-fourth interest in which was purchased on June 20, 1913, by Clayton T. Eaid, the initiating complainant herein? (Pages 19, 36 and 75 of Record.)

A great deal of evidence was introduced by complainants at the trial of this case, however, relative to a certain contractual relationship between Clayton T. Eaid, the initiating complainant herein, and Twohy Bros. Company, one of the defendants herein. That contract had to do solely with a certain invention of said Eaid in Improvements in Logging Bunks, for which he had filed an application for a patent, and which invention he was promoting at the time (Page 48 of Record). The contract had no connection whatever with the McConnell patent on which this suit was brought, for *Eaid had absolutely no interest in the McConnell patent at the time, and it was a year and six months after the date of that contract, and three months after the cancellation of said contract, that Eaid purchased a one-fourth interest in the McConnell patent.*

The manner in which this evidence was put into the case at the trial, caused the Court to remark (Page 30 of the transcript of the evidence, omitted from the Record):

"The idea that I got from the allusion to the contract was that the McConnell Bunk was the subject matter of that contract, so I guess the contract better go into the evidence."

The following brief statement of the facts, therefore, shows the roundabout course taken by Eaid in his endeavor to force the defendants herein to pay him further for *his* invention, even after it had been fully tested at big expense to defendants, and proven to be not a commercial success (Bottom Page 63 and 64 of Record):

On December 29, 1910, Eaid filed an application for a patent for "Improvements in Log Bunk and Stake for Railway Cars," which application he allowed to become abandoned in the Patent Office.

On December 22, 1911, Eaid entered into the above-mentioned contract with Twohy Bros. Company, wherein said Twohy Bros. Company was to undertake to manufacture and sell Eaid's bunk. (Defendants' Exhibit 1, Page 81 of Record).

On February 12, 1912, Eaid filed a second application for "Improvements in Logging Car Bunk and Stake" on which patent No. 1,055,150, issued March 4, 1913. (Defendants' Exhibit 3, Page 89 of Record).

On March 28, 1912, a supplemental agreement was entered into between the parties, wherein "*owing to the fact that there are other bunks on the market presenting a competition in the sale of such equipment and are sold for a less sum than is provided for in contract heretofore entered into between the parties,*" it was provided that the selling price for said Eaid Bunk as named in said original agreement, should be reduced. (Complainants' Exhibit G, Page 79 of Record).

On April 25, 1912, Eaid renewed his above-mentioned abandoned application, as shown on the face of his patent No. 1,050,929, issued January 21, 1913. (Page 89 of Record).

On March 27, 1913, said original contract and its supplement, were cancelled by written agreement of the parties thereto for a cash settlement and consideration paid to Eaid. (Defendants' Exhibit 4, Page 91 of Record).

On June 28, 1913, three months later, Eaïd having learned of the McConnell patent (it had been cited by the Patent Office on January 25, 1911, against his pending application), purchased an undivided one-fourth interest in it, as per copy of assignment. (Page 75 of Record).

Mr. McConnell testified at the trial, April 22, 1914 (Page 31 of Record), that he met Mr. Eaïd about a year ago, and that he never had any dealings with him other than the negotiating of that assignment.

Eaïd testified (Page 42 of Record), "I knew that the McConnell patent was in existence and had a copy of it *for some time* at the time (December 22, 1911), I made the contract with Twohy Bros." He had no interest in it, however, until three months after his contract with Twohy Bros. had been cancelled by agreement.

Eaïd also testified (page 45 of Record) *that he "never made a full sized working bunk involving the construction as embodied in" the McConnell model.*

Eaïd also states (Page 49 of the Record), regarding the McConnell patent of which he had learned, that he "*thought there were some principles involved in the McConnell patent at that time—this block here operated on a trunnion with a pivot—which I might possibly want to use, and I didn't believe I could get around.*" This indicates that Eaïd, for the first time had brought to his mind *the idea of a chock having trunnions and being pivotally mounted.* Reference to the Eaïd patents, pages 87 and 89, clearly indicates that nothing of the kind is suggested therein.

DEFENDANTS' CONTENTION.

Defendants contend that the Chandler Bunk does not infringe the McConnell patent. This was the clear and unqualified decision of the Court below, after hearing the testimony in connection with the models of the two inventions, and after carefully analyzing the claims of the McConnell patent with the improvements embodied in the Chandler Bunk.

The issuing of the Chandler patent nearly five years after the McConnell patent issued, while not conclusive, yet, as stated by the Court below (Page 19 of Record): *it engenders a presumption prima facie that there is a patentable distinction or difference between the later and the earlier devices.*" Citing:

Electric Candy Machine Co. v. Morris, 156 Fed. 972, 975.

This presumption is strengthened by the fact that ten comparatively broad claims were allowed for the improvements described in the Chandler patent, and the patent was actually issued within four months from the time the application therefor was filed.

The McConnell patent was not at any time cited against the Chandler application.

PATENTS CLASSIFIED.

Patents are classified under the decisions as either PRIMARY or SECONDARY, the former being subject to liberal interpretation or construction, and the latter being subject to very strict and close construction. The leading cases on this subject are:

McCormick v. Talcott, 20 Howd. 402.

Railway Co. v. Sayles, 97 U. S. 554.

Morley Mch. Co. v. Lancaster, 129 U. S. 273.

Kokomo Fence Co. v. Kitselman, 189 U. S. 8.

As Judge Taft states it in *Penfield v. Chambers Bros. Co.*, 92 Fed. 630-649:

“The more meritorious the invention, the greater the step in the art, the less the suggestion of the improvement in the prior art, the more liberal are the courts in applying in favor of the patentee the doctoring of equivalents. The narrower the line between the faculty exercised in inventing a device and mechanical skill, the stricter are the courts in rejecting the claim of equivalents by the patentee in respect of alleged infringements.”

In the case *Railway Co. v. Sayles*, above cited, on the question of Secondary patents, we have this language:

“If the advance toward the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs.”

“It clearly appears that complainant was not a pioneer in this department of machinery. Many inventors had preceded him and many patents had been issued. We think the case is one where, in view of

the state of the art the patentee is entitled, at the most, only to the precise devices mentioned in the claims.”—*Boyd v. Janesville*, 158 U. S. 260.

The man who first conceived the idea of providing a supporting bolster, or bunk, with a holding chock *which could be released at will*, so as to drop down away from the log and permit the latter to roll from the bunk, or bolster, was entitled to a *Primary* patent for his idea. Any good mechanic, after the suggestion of the idea, could design various mechanisms to accomplish the result. A second step, or a first improvement, in the art was to provide a chock, which, *in addition to being tripped* so as to automatically release the log, *could be adjusted to different positions* on the supporting bunk, and thereby adapt said bunk to hold one or more logs. A third step, or a second improvement, in this art was to provide in such bunk, a holding chock with releasing means therefor *which could be manipulated from the opposite side of the car*, thus making it possible for a person to stand in a safe place when releasing the chocks.

All three of these broad ideas were fully and clearly disclosed in a number of prior patents long before McConnell, Eaid, or Chandler entered the field. Thus, the reason why these patents have specific claims.

Referring first to patent No. 513,124, issued to Matheny, January 23, 1894 (Defendants' Exhibit 7, Page 93 of the Record), we have this language, page 1, lines 14 to 18:

"The object is to provide a bunk which may be convenient to load, will hold the logs securely both against rolling off and sliding thereon, and may be *easily and safely* unloaded."

and in lines 89 to 95, same page, we find the following:

"To hold the logs from rolling off sidewise, I use chock blocks C, or cheese blocks as they are sometimes called. *These are adjustable to different positions on the bunk and may be dropped down level with the top of the bunk so that the logs may roll off unhindered.*"

The claims of this Matheny patent clearly indicate *that even it was not a Primary patent, although it was issued exactly fourteen years before the McConnell patent application was filed, and has been public property for four years.*

Referring to patent No. 790,915, issued to Parsons, May 30, 1905, Defendants' Exhibit 8, Page 95 of the Record, we again have the broad idea suggested in the following language (lines 9 to 17, page 1):

"This invention relates to means for securing logs, lumber, and like material upon the bolsters of trucks or running-gear of cars or wagons used in the hauling of same.

The invention aims to provide for ready adjustment of the chock or load-retainer upon the bolster, the firm securance of the same in the adjusted position, and its quick release when it is required to unload."

The foregoing patents, with others, were cited by the Patent Office against the application on which the McConnell patent afterwards issued. This is shown in the file wrapper of the McConnell patent (Defendants' Exhibit 5, here in court, but not printed as a part

of the Record), and because of these prior patents, certain differentiating limitations were necessary in the McConnell claims, and were inserted by amendment in order to distinguish them from the prior art, and in order that a patent might be allowed thereon.

Regarding the Matheny patent cited, the Examiner said (Page 13 of said Exhibit 5):

"The chock C is pivoted and slides; means for limiting the movement of the chock are C¹ and plates S; means for actuating the chock are levers L—L and their connections to plates S—S."

As early as 1888 we have, in the Wilbur patent No. 387,477 (Defendants' Exhibit 10, Page 99 of the Record), a disclosure of a bunk with adjustable holding chocks thereon, capable of being manipulated from the opposite side of the car and moved down out of the way, so as to permit the load to be discharged from the car.

In 1899, in the Thompson patent No. 416,128 (Defendants' Exhibit 11, Page 101 of the Record), there is clearly shown a pivotally mounted chock adapted to be actuated, or positively moved in either direction, by connecting rods very similar to McConnell's.

It is very clear, therefore, from the prior art, that neither the McConnell patent, nor the Chandler patent can be considered as a Primary patent, and if the devices therein shown and described involve more than mechanical skill and rise to the dignity of invention, these patents can at best be considered only as Secondary patents, covering different mechanical means for performing in different ways, functions which had

been performed many years prior by similar devices, *and they must, therefore, if their claims are to be sustained, be limited to the specific elements and limitations set forth therein.*

LAW

A construction broad enough to cover infringement by equivalency may defeat the claim, because broadening the construction broadens the danger of anticipation.—Pope v. Gormully, 144 U. S. 238;

A broad claim, such as is now insisted upon, would make his claim void for anticipation. In view of the history of devices intended to perform the same function, his patent can only be saved by confining him to the specific form he has described and claimed.—Jeffrey v. Independent, 83 Fed. 191; 27 C. C. A. 512.

The means by which this or any other result or function is accomplished may be many and various, and, if those several means are not mechanical equivalents, each of them is patentable.—Boyden v. Westinghouse, 70 Fed. 816; 17 C. C. A. 430.

Where the margin of invention is very narrow, the doctrine of equivalents cannot be invoked to make out infringement.—Doze v. Smith, 69 Fed. 1002; 16 C. C. A. 581.

If complainant's claim should receive such construction as would cover defendant's machine, then it was clearly anticipated in the prior devices already referred to; that if valid under a narrow and restricted construction, which would limit the patent to the specific

device described in the specification, then it is not infringed by defendants.—Fox v. Perkins, 52 Fed. 205; 3 C. C. A. 32.

If the claims of the patent in suit were so construed as to charge the defendant with infringement, the claims would be void for want of novelty; if construed so as to avoid anticipation, defendant does not infringe.—Gates v. Fraser, 55 Fed. 409; 5 C. C. A. 154.

McCONNELL BUNK.

Referring to the specification and drawings of the McConnell patent (Page 73 of the Record), the mechanical features which were considered to be new and on which the patent is based, are specifically described on page 1 of its specification, lines 72 to 93, and are shown in enlarged special views in Fig. 3 and Fig. 4 of the drawings. The new features comprise a pair of

“combined guide and stop devices such as shown in Fig. 3 and each of which consists of a face plate 14 having an integral longitudinally extending ratchet bar 15. A longitudinally channeled guide 16 is formed integral with plate 14 and located above but beyond the side of the ratchet bar. Four of these guide and stop devices are used in connection with each pair of beams 3, said devices being arranged in pairs as indicated in Fig. 1, and adjacent the ends of the beams. Interposed between the stop devices of each pair is a chock consisting of a bowed or curved arm 17 having trunnions 18 designed to travel within the guides 16. Those portions of the trunnions outside of the guides and above the ratchet bars 15 are provided with cam faces 19 terminating in shoulders 20 designed, when the arm 17 is swung upward, to turn downward into engagement with the adjoining teeth of the ratchet bars.”

By referring to the left hand side of Fig. 1, which is a plan view looking down on top of the device, it will readily be seen how the *opposite ends of the trunnions 18 slide in the channeled guides 16*, and how the *cam portions 19 of said trunnions move directly above the ratchet bars 18 of said combined guide and stop devices*.

By reference to the right hand end of Fig. 2, it will be seen how the shoulders 20, of said cams 19, move down to engage with the adjoining teeth of the ratchet bars 15, "when the arm 17 is swung upward." These *cam shoulders 20*, projecting downwardly into the ratchet bars 15, *when the chock is raised*, prevent said chock from sliding outwardly in the channeled guides 16. There is nothing else to prevent this.

Referring to lines 93 to 103, page 1 of said patent, we find described *specific means for actuating (pulling and pushing) the chock called for in the claims*.

"An arm 21 extends downward from each of the chocks and *pivotaly connected to it is a link 22* having a series of apertures 23, any one of which is designed to receive a wrist pin 24 extending from arm 21. The link 22 of one of the chocks is connected to a *crank arm 25* extending from the adjoining shaft 5 while the chock at the other side of the car is similarly connected to the crank arm 25 extending from the other shaft 4."

Referring back now to lines 51 to 57, we find these shafts 4 and 5 described as follows:

"Parallel *actuating shafts 4 and 5* are journaled within the middle portions of all of the beams employed and extending from the middle portion of each of these shafts is an arm 6 to which is pivot-

ally connected the forked end 7 of an *actuating rod 8.*"

Thus by means of the *actuating rods 8* and the *actuating shafts 5*, and their *connecting crank arms 25* and *links 22*, the chock 17 can be *positively actuated in either direction*, that is, *pulled out of engagement* with the "stop devices" or *pushed into engagement* therewith.

Referring to page 2 of the patent specification, beginning in line 6, we find this operation described in the following language:

"The operator releases the bars 8 and *pushes* them inwardly. This will cause shafts 4 and 5 to be partly rotated and motion will be transmitted through arms 25 to links 22. Arms 21 will therefore be swung outwardly and *move the shoulders 20 downward into engagement with the adjoining ratchet teeth.* This operation will bring the shaft 5, wrist pin 24, and the pivotal connection between link 22 and the arm 25 practically in alignment so that each chock becomes locked in an elevated position and it is impossible to lower it by exerting pressure there against."

Referring to line 25:

"When it is desired to dump the logs the car is placed in an inclined position and the operator goes to the elevated side of the car and *pulls outwardly upon the operating arm 8.* This causes the shaft to which the bar is connected to partly rotate and to *pull on its link 22.* The arms 21 of the chocks at the lower side of the car will thus be *pulled inwardly simultaneously* and the *partial rotation of the trunnions which is thus produced serves to withdraw the shoulders 20 from engagement with the ratchet teeth* and the chock is free to *swing downward and move inwardly.*"

It is clear, therefore, from the patent itself, that, as stated in the opinion of the Court below (Page 17 of the Record): "the chock can not be lowered, when the pressure of the logs is against it, except by *pulling the co-operating rods outwardly*. The chocks are slidable in the channeled guides, and *when lowered* may be adjusted to suit the size of the logs being loaded, but *not when elevated or locked*."

Mr. Eaid testified regarding McConnell's bunk (Page 34 of the Record), "in *pulling* this bar (8) there it *throws* the chock down in that position, unlocks it and *throws* it down, so the log can roll off on the opposite side. The principle of it is to *adjust this block, to shove it in any place* so that you can adjust it to take different sized loads of logs * * * The part we claim patent on is this block, a block operating on *a trunnion here, and manner of operating the block when in upright position to hold against the thrust of the logs*."

The testimony of complainants' expert, Clinton F. Blake (Pages 55 and 56 of the Record), on cross examination, clearly shows that he did not understand the operation of the McConnell device, or that he deliberately tried to mislead the Court, for in answer to the question: "Is it not also true that the cam portion designated 19, shown clearly in figure 4, is so positioned as to move over these notches when the chock is in one position, and when in another position the cam portion 19 moves down into and engages the notches 15?" he answered, "No, sir. The cam portion 19 seems never to enter the slots. Seems never to enter the notches." This, as seen, is contradicted absolutely by the specification of the patent itself.

Referring to pages 59 and 60, said expert, Blake, gave the following testimony regarding the operation of the McConnell device:

"The means for lowering the chock in the McConnell patent is this arm 25 and the link 22. Through the shaft 5 and the link 25, and the arm or link 22 the chock of the McConnell patent is *positively moved or positively actuated, the purpose being to draw these cams out of engagement with the fixed stop devices.* In a full sized working machine it would be necessary to have such a device as this for *positively moving the chock to disengage it from the stop devices.*"

In the McConnell device, without the cams 19 and their shoulders 20, formed as a part of the trunnions 18, to engage the ratchet bar 15 when the chock is raised, the device would not operate, *for there is absolutely nothing to prevent the upper end of the chock from being pushed along outwardly in the guides 16, were it not for these ratchet-teeth, or "stop devices."*

CHANDLER BUNK.

Referring now to the Chandler device, the construction briefly described, comprises a box-like body provided at its opposite inner sides with two brackets 6—6, having corrugated upper edges forming *trunnion seats*, and a chock 9, having trunnions 10, which are interchangeably seated in the corrugations or seats of the bracket members 6. The upper end of the chock 9 projects upwardly through a longitudinally extending slot, as 5, in the top of the box-like body. *The chock is movable by hand from one seat to another at any time, whether in its raised or down position.* It is pro-

vided at its lower end with a projecting lip or flange 11, shown in Figs. 2 and 3. A latch 12 hinged to the inside of the body, as at 7, is adapted to be swung inwardly over the projecting lip or flange 11, by means of a rocker rod 13, having an offset portion or kink 15, which, when the rod 13 is turned by means of its handle 16, moves the latch 12 toward the chock and over its projecting lip or flange 11. This latch 12, therefore, prevents the chock from turning on its trunnions 10. *The Chandler chock is adjusted by hand and there is no "actuating rod" or lever connected to it "for positively moving" it, or for adjusting it along any slideway. It must be lifted from one seat over to another.*

CLAIMS.—THE LAW.

The claim is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different *from the plain import of its terms.*

Westinghouse v. Edison, 63 F. R. 588, C. C. A. 11-342.

That the prior state of the Art to which an invention belongs must be considered in construing any claims for that invention, see

Mattox v. U. S. 156 U. S. 237 (260).

Dederick v. Seigmund, 51 F. R. 233 (235).

Brush Elec. Co. v. Electric Imp. Co., 52 F. R. 972.

Boston Lasting Mch. Co. v. Woodward, 53 F. R. 481.

In view of the prior state of the Art and the proceedings had in the Patent Office, the claim of complainants' patent should be construed against him and be restricted to the particular device described.

Warren v. Casey, 93 Fed. 963, 36 C. C. A. 29, citing Mahn v. Harwood, 112 U. S. 354, Sargent v. Lock, 114 U. S. 63.

Of course an inventor cannot by the mere use of the word "means," in reference to the accomplishment of a designated function in a combination claim, appropriate any and all kinds of mechanism or devices which may perform the specified function, or any other mechanism or device than that which is described in the patent, or which is its equivalent. Reference must be had to the specifications to ascertain the means which are made an element of the claim and are protected by the patent.—American v. Hickmott, 142 Fed. 141; 73 C. C. A. 359.

While the claims specify the physical elements of the combinations, they do not specify the means whereby those elements perform their intended functions, but call for "means" generally for performing them. By this is not meant all possible means for accomplishing the result. Such comprehensiveness of claim would not be patentable. The claims in question by direct terms refer to the specification for the means by which the function, purpose, or object of the invention is to be accomplished, and to that we must look for them.—Union v. Diamond, 162 Fed. 148; 89 C. C. A. 172.

Dryfoos v. Wiese, 124 U. S. 32.

"No principle has been more firmly established and consistently applied in the Federal Courts of last resort, than that the patent must be construed in conformity with the self-imposed limitations contained in the claims. The application of this principle of construction may be invoked in support of the validity of the patent as well as denial of infringement."—Matheson v. Campbell, 69 F. R. 597.

McClain v. Ortmayer, 141 U. S. 419.

Groth v. Postal Supply Co., 61 Fed. 287.

Groth v. International, 61 Fed. 284.

Keystone Bridge Co. v. Iron Co., 95 U. S. 278.

Wright v. Yuengling, 155 U. S. 47.

Where a claim ascribes a function to any of the things which it specifies, that ascription is a limitation of that claim.

Masseth v. Larkin, 111 F. R. 409.

Eppler v. Campbell, 86 Fed. 141 (143).

Quoting from Masseth v. Larkin:

"To ignore the express functional limitation of the claim, viz.: 'Arms adapted to engage with the sides of the hole,' would be to create a new claim, not interpret the one granted."

Quoting from Anthony v. Gennert, 108 F. R. 396; 47 C. C. A. 426:

"To ignore the express functional limitation of the claim, viz.: 'Whereby they (wings) are enabled to fold back into the case side by side,' would be to create a new claim, not interpret the one granted."

In *Eppler v. Campbell*, 86 F. R. 141; 29 C. C. A. 616, we have:

"On a legal construction of this claim, anything which does not possess this function and this action, no matter to what extent in other particulars it may answer its cause, does not infringe it."

Changes made while the application is pending in Patent Office to meet objections, must be given effect in construing patent issued on amended application without regard to whether it was required by the prior art.

Campbell v. American Shipbuilding Co., 179 Fed. 498.

Safety Oiler Co. v. Scovill Mfg. Co., 110 F. R. 203.

Crawford v. Heysinger, 123 U. S. 589 (602).

Bate Refrigerating Co. v. Eastman, 24 F. R. 649.

The proceedings in the Patent Office, and the language of the specification and claims, place certain limitation upon the patent. The claim was rejected on references and finally submitted in the form in which it appears.

Lovell v. Johnson, 91 Fed. 160; 33 C. C. A. 426.

McCONNELL'S CLAIMS.

In considering the claims of the McConnell patent relied upon in this suit, it is necessary to consider in connection therewith certain amendments made to the claims while in the Patent Office in order to meet the objections of the Examiner, and to differentiate the

claims from the prior patents cited by him against them. The claims as originally submitted, the Patent Office actions, and the amendments are all shown in the file wrapper of the McConnell patent, which is Defendant's Exhibit 5, here in court, but not printed in the Record.

The following are the amendments made to the McConnell claims to avoid the prior art:

“Claim 1, line 4, before ‘means’ insert ‘fixed’; line 5, before ‘to’ insert ‘*only*.’ Same line, cancel ‘swinging’ and substitute ‘*sliding*.’”

Claim 2, line 2, after ‘devices’ insert ‘*fixedly*’; line 4, after ‘devices’ insert ‘*only when the chocks are raised*’; line 5, cancel ‘rotation’ and substitute ‘*sliding movement*.’”

Claim 4, line 2, after ‘devices’ insert ‘*fixedly*’; line 4, after ‘devices’ insert ‘*only when the chock is raised*.’”

Claim 10 was submitted with the amendment.

McCONNELL CLAIM 1.

Claim 1 may be analyzed as follows:

1. Parallel beams.
2. Means for securing the beams to a car platform.
3. Oppositely disposed chocks pivotally and movably mounted between the beams.
4. Fixed means for engaging the chocks when elevated only to hold them against sliding movement in one direction.
5. Means carried by the beams for actuating the chocks.

Referring to the changes made in Claim 1, we find that "fixed" was inserted before "means," line 5, that "only" was inserted before "to," line 6, and that "sliding" was substituted for "swinging," in line 7.

Analyzing Claim 1 of the McConnell patent with the Matheny device, the Matheny bunk has no "parallel beams," but has one heavy beam or body. Nor has the Chandler bunk parallel beams, but a box within which its mechanism is mounted and protected.

The Matheny patent has "*means for securing the bunk body to the car platform,*" which are the rods H—H.

The Matheny patent shows "*oppositely disposed chocks (C) pivotally and movably mounted.*"

It will be noticed that the Matheny chocks C are not only pivoted on trunnions, but that these trunnions c—c, slide in slide-ways b—b, similar to the McConnell construction. The Chandler chock has trunnions seated in bearing seats, but there is no slide-way and while the chock is movable, it must be moved by being lifted bodily by hand from one seat to another.

The Matheny patent also shows "*fixed means for engaging the chocks when elevated only to hold them against sliding movement in one direction,*" and as stated by the Examiner in one of his actions against the McConnell application, the "means for limiting the movement of the chock are C¹ and plates S." The qualifying word "*fixed*" which was inserted in the McConnell claim was required, therefore, to distinguish it from the Matheny patent, for this patent shows

movable means for engaging the chock when elevated only, which *movable* means is its slide plate S. When in one position it underlies the fixed arm C¹ of the chock when the chock is raised, and when said plate S has been shifted it allows the chock C to move down into the position shown in dotted lines, figure 4 of the Matheny patent.

It should also be noted of the Matheny device that the web which has in it the holes t, t, is really a *fixed means*, or stop device, for engaging the chocks when elevated, and also when down, and holds them against sliding movement in both directions. The Matheny chock must be lifted slightly before it can be slid in either direction. The qualifying word "only," inserted in McConnell's Claim 1, was required, therefore, to differentiate it from the Matheny construction, for Matheny's fixed means, the web, or plate having the holes t, t, therethrough, engages the chock C, for holding it against sliding movement in either direction, when elevated, and also when lowered.

The Matheny patent also shows, "means carried by the beams for actuating the chocks," which means, as stated by the Examiner, "are levers L—L and their connections to plates S—S." Now if, as complainants contend, Chandler's trip latch, which simply releases the chock to permit it to act automatically, is means for *actuating* the chock, then the Matheny patent, which also shows a means for releasing or tripping the chock so that it falls automatically, as does Chandler's, then the Matheny patent anticipates McConnell's claim in this respect also. However, McConnell has a very dif-

ferent means for actuating his chock, for he positively pushes and positively pulls his chock into different positions. His chock, by reason of the frictional contact between the flat surfaces of the shoulders 20, and the flat surfaces of the ratchet bar 15, requires that the chock must be pulled when the weight is upon it (Eaid's testimony, page 34 of Record, and Blake's testimony, bottom of page 59 and top of page 60 of Record) Neither Matheny nor Chandler is required to thus positively actuate his chock, for their constructions are such that as soon as the holding means are moved, the chocks are released and automatically fall or turn under their own weight.

The qualifying word "only," inserted between "elevated" and "to" in line 6, Claim 1, McConnell patent, was also required for the reason that *only when the chock is raised, can the "fixed means" (ratchet bar 15) engage the chock so as to hold it against sliding movement, that is, only when McConnell's chock is up, is its cam portion 19 down in holding engagement with said "fixed means," and only when the chock is down, is its cam portion 19 out of engagement with ratchet bar 15, so that the chock can be slid on its trunnions 18 in the guideway 16.*

The substitution of the word "sliding" for the word "swinging," in line 7 of the claim, was made for the reason that the chock is not thus held against "swinging" movement, but is held against a "sliding" movement.

The Court below got a clear understanding of the invention from the testimony of the experts in connec-

tion with the models, and regarding Claim 1, states:

“The fixed means for engaging the chock are the ratchet-teeth, and the engagement is effected when the chock is elevated only. This holds the chock against sliding movement in one direction. The means carried by the beams for actuating the chock are the rods and their mechanism with the cross-shafts and crank-arms.”

Defendants would urge that the Court below erred in reading into Claim 1, line 6 of the McConnell patent, a comma after the word “only,” where none appears in the patent. *It is only necessary to refer to the amendments made in claims 2 and 4 at the same time, to determine what was intended, and what construction should be placed thereon.* In Claim 2, the insertion after the word “devices” was: *only when the chocks are raised*; and in Claim 4, the insertion after the word “device” was: *only when the chock is raised*. If the word “only” was intended to apply to the clause: “to hold them against sliding movement,” as counsel for complainants contend, then a comma *before the word* “only” would have been included as a part of the insertion at the time the claim was amended. The Rules of Practice require this. The language in the specification, the operation of the invention itself, and the testimony of the witnesses, all very clearly establish the fact that the qualifying word “only” refers to the elevated position of the chock, for *only when the chocks are elevated, are they engaged by the fixed means* (ratchet bars), which hold them against sliding movement. *The words inserted in claims 2 and 4, at the*

same time claim 1 was amended, and for the same purpose, is the strongest kind of evidence to support our contention that the Court below did not err in its reading of Claim 1.

Reading Claim 1 of the McConnell patent with the Chandler device, we find that the Chandler device does not have "parallel beams," but has a metal box, or "body," *within which its mechanism is all contained and protected.*

The Chandler device has no "*fixed means for engaging the chocks when elevated only to hold them against sliding movement in one direction.*" If, as counsel for complainants contend, Chandler's corrugated brackets are "*fixed means*" for engaging the chocks when elevated, then, *they engage the chock at all times, whether the chock is elevated or whether it is down,* and hold the chock against sliding movement in either direction. The supporting brackets 6 of the Chandler bunk pivotally support the chock in different positions *so as to permit it to swing freely and automatically when released.* As the Court below said (Page 21 of Record):

"If it be said that the bracket-seats in the Chandler device are stop devices, then the chock is always in engagement with them, and not when in an elevated position only. The chock can be adjusted at all times by moving it forward or back, whether in an elevated position or not, and whether the means for engaging the chock are set or not. The movement consists in raising the chock from the bracket-seats in which it rests and dropping it into others, and cannot be appropriately termed a sliding movement."

The Chandler device has no "means carried by the beams for *actuating* the chocks." The term "actuating," as used throughout the McConnell patent, must necessarily refer to a *positive movement*,—a pushing or pulling thereof, and the means "for actuating the chock" are the links 22, *which are "pivotally connected to" the lower ends of the chocks and by means of which the chocks are positively raised, and positively lowered, and positively slid on the guide-ways 16 to different positions.* On the contrary, the Chandler chock has *no means for actuating it, or for moving it.* It is *freely supported upon its trunnions in its bracket seats 6.* *It is moved or lifted from one seat to another by hand. It can be thus moved whether in its raised position or lowered position. In fact, it is more convenient to move it when it is raised, for then it projects upwardly so as to be easily gripped by the hand.* There are no actuating rods or links or other equivalent members "connected to" its lower end, by means of which it can be moved. There is a swinging latch which is swung out over the lower end of the chock when it is down, but this is not a means *for moving the chock* and it does not prevent or *in any way interfere* with the movement thereof, no matter in what position the chock may be.

McCONNELL CLAIM 10.

Analyzing Claim 10 of the McConnell patent, the elements are:

1. A chock.
2. Stop devices for engagement with the chock when in one position.

3. Means for lowering the chock to disengage it from said devices and for sliding the chock while in lowered position.

If we eliminate the qualifying functional statements from this claim we have simply: a chock, stop devices, and means for lowering the chock, all of which are found in any of the prior patents. For example, in the Matheny patent we have a chock C (which also shows trunnions and slide-ways), stop devices S "for engagement with the chock when in one position," and means for lowering the chock, which are, as Examiner says, "levers L—L and their connections to the plates S—S."

In the Wilbur patent we have the chock D, the stop devices, which are the serrated bars C which hold the chock against movement in one direction, and means for lowering the chock, which is the trip rod G.

Claim 10 is absolutely met by the Matheny patent and other prior patents, if we omit the differentiating functional statements from said claim.

In this claim, the functional statement, "*for engagement with the chock when in one position*," which qualifies the "stop devices," reads clearly on the plate S in the Matheny patent, for this plate is certainly a stop device which engages the chock C when in its up position. In fact all stop devices must engage the chocks in at least one position. Then there is in the Matheny patent the web or plate which has the holes t, t, therethrough, which is the real stop device for preventing the Matheny chock C from sliding in either direction. His slide plate S prevents the chock C from

swinging from the up to the down position, but the other plates having the holes t, t, to receive the arm C¹ of the chock C, holds it against sliding.

In this claim also the "*means for lowering the chock*" is differentiated by the functional statement, "to disengage it from said device," and also by the functional statement "*for sliding the chock while in lowered position.*" Without the differentiating statement, "*to engage it from said devices,*" the claim would read absolutely on the Matheny device, for this patent certainly shows "means for lowering the chock." All similar bunks, as we have seen, have means for lowering the chocks. The McConnell means for lowering his chock is the connecting link 22, which, with its connections, is pivotally connected to the lower end of his chock for the purpose of positively moving the same, and this link is used not only for lowering the chock *to disengage it from said devices*, but also *for sliding the chock while in lowered position.*

In the Chandler bunk there are no stop devices, such as called for in the McConnell patent, which engage the chock at one time and not at another. The Chandler chock has no means for lowering it *to disengage it from said devices*, for *it is never disengaged therefrom*, if its seats in the brackets 6 are to be considered stop devices; nor has the Chandler device "*means for sliding the chock while in lowered position,*" nor while in any position, for *it is moved by hand only and then must be lifted bodily from one seat to another.* It is never disengaged except when lifted bodily out of the seats.

The claim fails absolutely to read on the Chandler device, and any construction which would make it read on the Chandler device would absolutely invalidate the claim, for there are many earlier patents on which said claim 10 would read, if the functional differentiating statements are omitted.

If these functional differentiating statements, which were brought into the claims by amendment, were considered by the Patent Office to be sufficient to differentiate said claims from the prior patents, which the Examiner had cited, then it is absolutely necessary that they should be considered important in construing the claims. We submit that the McConnell device and the Chandler device are mechanically very different and operate very differently in performing the functions for which they were designed. There is absolutely no part of one device which could be substituted for a corresponding part of the other device without a complete reconstruction thereof. It is only necessary to look at the parts to determine this, and in order for one part to be the equivalent of another part, even in patents which might be considered Primary, that part must be the same as the other part and do the same work in substantially the same way, and accomplish substantially the same result.

We respectfully submit, therefore, that the Chandler device does not infringe the McConnell patent in any sense of the word for the following reasons:

First. The McConnell patent, because of the prior state of the art relating to car bunks, is a Secondary

patent and must be strictly construed if it is to be held valid.

Second. The claims of the McConnell patent are differentiated from the prior art by functional statements, and if these functional statements are omitted the claims are absolutely anticipated element for element in patents issued long prior thereto.

Third. Claims 1, 2 and 4 of the McConnell patent were amended during the prosecution of the application in the Patent Office so as to meet the objections thereto by the Examiner, and in order to differentiate said claims from prior patents cited by him. Those amendments were then held to differentiate said claims from the prior art, and they must now be held to differentiate them from the Chandler bunk.

As stated by the Court below, the other claims of the McConnell patent are all narrower than the claims considered, and need not be analyzed separately.

Very respectfully submitted,

WILLIAM R. LITZENBERG,

Solicitor for Appellees.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CLAYTON T. EAID and JOSEPH A. McCONNELL
APPELLANTS

VS.

TWOHY BROS. COMPANY, a Corporation
JOHN TWOHY,
THE NORTHWESTERN EQUIPMENT COMPANY
a Corporation, and
ELBERT G. CHANDLER
APPELLEES

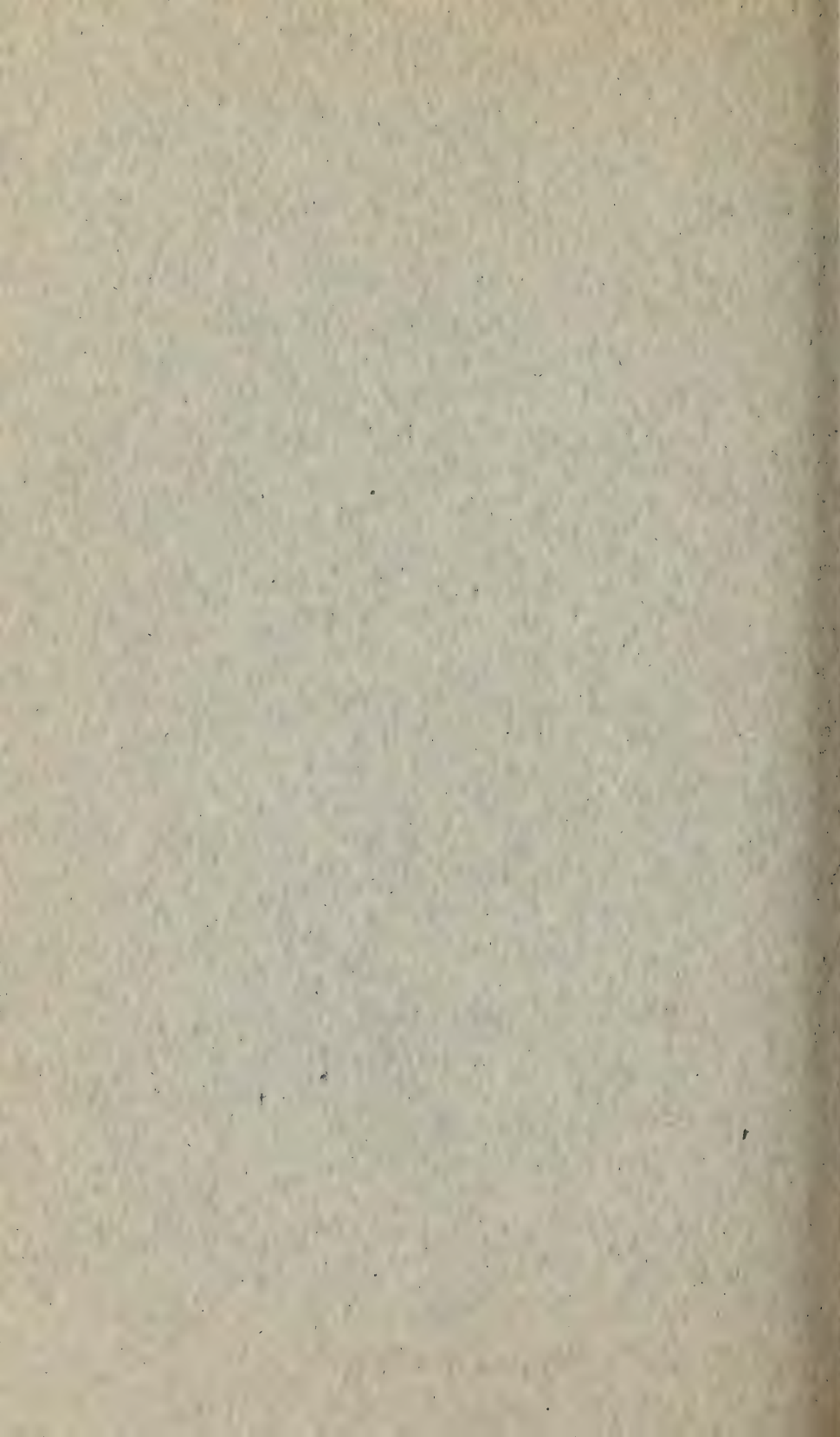
Petition for Rehearing

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RICHARD SLEIGHT,
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GLENN E. HUSTED,
Of Counsel

Filed

1916 - 10

F. D. Wood



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CLAYTON T. EAID, and JOSEPH A.
McCONNELL,
Appellants,

vs.

TWOHY BROS. COMPANY, a Corporation, JOHN
TWOHY, THE NORTHWESTERN EQUIP-
MENT COMPANY, a Corporation, and EL-
BERT G. CHANDLER,
Appellees.

Petition for Rehearing

*To the Honorable, the United States Circuit Court
of Appeals for the Ninth Circuit.*

Appellants petition for rehearing and humbly
show:

This Honorable Court, in affirming the court
below, in some manner came to consider exhibits ex-
cluded by the trial court, and it seems the decision
is founded on those very papers. (See Decision,
pages 2, 3, 4, 5.)

The fact that these exhibits were considered at
all entitles your petitioners to a rehearing.

The said exhibits are Defendants' Exhibit 10, alleged patent to Manly Wilbur, and Defendants' Exhibit 11, alleged patent to Robert Thompson.

Their admission was objected to upon the ground that they were not certified. See U. S. R. S., Title XIII, Sec. 892.

The trial court sustained the objection.

See Record, page 71, next to last paragraph.

Counsel for appellees assumed (Appellees' Brief, page 9) these exhibits were received in evidence, and this Honorable Court, probably misled thereby, overlooked the reference to their exclusion in Appellants' Brief (bottom of page 25 and top of page 26).

It will clarify the situation to explain that these particular exhibits were offered without notice and without any accompanying testimony at the very close of the trial (see Record, page 71). If they had been admitted the appellants should have produced to the Court evidence showing wherein they fail to anticipate the very gist of the McConnell invention, although to do so would have necessitated the reopening of the whole case; but when they were excluded that evidence could not be presented or considered.

Neither the trial court nor this Court would have permitted appellants to contest a position assumed by appellees, when the only evidence to support that position had been excluded by the Court.

This Honorable Court says (Decision, page 2)

"McConnell was compelled by the Patent Office to amend his claims in several respects in order to avoid anticipation and to secure a patent at all."

This is a mistake. The Patent Office allowed the ten claims of the McConnell patent without any amendment except of claims 1, 2, and 4.

These particular claims were rejected upon the patent to Matheny, No. 513124. The same amendment, substantially, having been made in each of them, it will suffice to consider only claim 1.

The language of claim 1 before it was amended is the language of claim 1 of the patent except that in the patent the words "fixed" (line 5), and "only" (line 6), were introduced by the amendment, and the word "sliding" (line 7) was, by amendment, substituted for "swinging."

The Patent Office thus decided that Matheny did not have "fixed means" and awarded claims thereto to McConnell.

In the case at bar the fixed means the Patent Office awarded to McConnell, are the very means which Chandler uses, and upon the use of which the infringement is, in part, predicated.

The foregoing analysis shows how, in respect to claims 1, 2, and 4, only, McConnell avoided the Matheny patent, and shows the mistake of the Court in stating that it was necessary for him to amend his claims "in order to secure a patent at all."

Claim 10 demands special consideration. It defines the invention from an angle entirely differ-

ent from that of any other claim. It is not limited like claim 1 to "fixed" stop devices. Nowhere in the whole prior art is found the last element of the claim: "means for lowering the chock *to disengage it from said (stop) devices* and for sliding the chock while in lowered position." That is, any means for sliding a pivoted chock while in lowered position. Both the pivotal and the sliding movements are essential to the operation of the McConnell and of the Chandler devices. Chandler, as this Honorable Court observes (Decision, page 10), may move his chock "forward or back whether in an elevated position or not"; but that is purely incidental. The fact is in doing this and nothing more he does not accomplish the end he aims at. That end *demand*s the sliding of the chock in the lowered position under a log and then bringing it to an elevated position against the log. Sliding of the chock without lowering it will never insure the performance of its office. In other words, without the capacity for both sliding and pivotal movement it must often prove to be no chock at all.

In the development of the art prior to McConnell, chocks were made only to slide against the extreme outer circumference of a log. If they held there well and good. If not the chock action was lost. *McConnell conceived the new idea of sliding the chock in lowered position under the log, within the extreme outer circumference of the log and BEYOND A POINT TO WHICH IT COULD BE SLID WITHOUT LOWERING IT, and then raising it into the log.* It is

this very idea that Chandler has taken from McConnell.

Eaid describes this operation (Record, pp. 38-39) as follows: "The function performed by it (the chock) is the lowering of this chock, and *the log coming over the top of it,*" etc.

The pivotal and sliding operations are effected in both the McConnell and the Chandler devices by direct manipulation of the chock. McConnell was the first to make such manipulation possible. Chandler infringes by using the same means to the same end.

Claim 10 is broader than any other claim at any time presented in the case and was allowed by the Patent Office without criticism and without amendment.

Inspection of the Exhibit File Wrapper and Contents (McConnell Patent) will show that when in the prosecution of his application, McConnell found his claims as originally presented required amendment, he at the same time found them inadequate to define his real invention, and thereupon, with evident care and discriminating analysis of the art, he drew and presented claim 10.

It is the very office of a claim to give notice to the world of its intended scope. In claim 10, its language is stripped of limitations of other claims. It defines McConnell's invention in that broad language which the Patent Office concedes only to breadth of invention. The form of claim 10 is in marked contrast with all which preceded it.

Its form is that which the Commissioner of Patents holds to belong only to broad claims. *Ex parte Halfpenny*, 73 O. G., p. 1135.

In the opinion of this Honorable Court in addition to the excluded Exhibits 10 and 11, two patents which are in evidence are mentioned, namely, the patent to Matheny aforesaid and that to Parsons, but it should be remembered, in considering these, that the Patent Office allowed the McConnell patent in suit notwithstanding that both the Matheny and Parsons patents were considered in the adjudication of the McConnell application, and that neither they nor any reference was cited against claim 10.

A patentee despite amendment of a claim upon rejection is entitled by virtue of the amended claim allowed "to maintain and secure every improvement that he has invented that was not disclosed by the references on which his original claim was rejected." *Wayne Mfg. Co. vs. Benbow-Brammer*, 168 F. 271 (C. C. A.).

The McConnell patent in suit discloses not a mere advance in the art along lines already marked out, but a new principle, and one entitled to a liberal application of the doctrine of equivalents. This is the fact. Counsel believes the Court has failed to recognize that principle because counsel has not been fortunate enough to clearly and convincingly state the case for which they contend and the reasons upon which it is founded.

The rule of equivalents is well established. The

main difficulty is in its application to this case. Appellants never intended to urge that the McConnell invention is a pioneer in the broadest sense of that term, but only that it is a pioneer in a sense clearly recognized in many cases. In *Bundy Mfg. Co. vs. Detroit Time Register Co.*, 94 Fed. Rep. 524, a case similar to the present, the Court held Bundy, the inventor of a subordinate device, was a pioneer, though not in a broad sense, and "entitled to protect his real invention by a reasonable application of the rule of equivalents."

Counsel insists it is certain the excluded Exhibits should not have constituted an element in the decision of the Court—in fact should not have been considered at all. If these be omitted and only such interpretation and effect given to the Matheny and Parsons patents as the facts and law permit, there remains no sufficient ground to support and sustain the decision.

If this Honorable Court, as may be inferred from its comparison between the McConnell and the Chandler patents (Decision, pages 9 and 10), entertains the opinion that a difference between the mode of operation of the McConnell device and that of Chandler exists, the Court is urged to consider the testimony of the witness Blake on that very point, bearing in mind Blake is the only witness in the case acquainted with the contents of the McConnell and Chandler patents and who had seen the Twohy or Chandler Bunk "in actual operation in the woods" (Record, page 50, last paragraph). Appel-

lee Chandler may perhaps be assumed to know his own patent, but he does not testify to any knowledge of the McConnell patent. (Record, pp. 62-64.) The testimony of appellees' expert, Streng, is entitled to little consideration in view of his admission that he has no practical knowledge of the machines of either party in suit (Record, p. 69, see top and bottom). He himself is favorably impressed, upon hearing the evidence at the trial, by McConnell's device (Record, pp. 68-69).

Blake says: "The chock of the McConnell patent may be actuated by direct manipulation, just as the chock 9 of the Chandler patent may be operated, certainly. That is adjusted back and forth and thrown up." (Record, near bottom page 60.)

"I do not wish to be understood as stating that the McConnell chock is operated by any different means—is necessarily operated by any means different from those employed in the Chandler. *The two chocks are operated by exactly the same means.*" (Record, paragraph middle page 61.)

Counsel for petitioners, hereby certify that in their judgment this petition is well founded and is not interposed for delay. Counsel desire to add that in their opinion a rehearing in this case should be granted in order to meet the strict ends of justice.

And your petitioners will ever pray.

CLAYTON T. EAID and
JOSEPH A. McCONNELL,
Petitioners.

By JOSEPH L. ATKINS,
RICHARD SLEIGHT,
Their Attorneys.

GLENN E. HUSTED,
Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of
Juneau, Alaska,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

Filed

APR 30 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of
Juneau, Alaska,

Appellee.

Transcript of Record.

**Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

JOHN RUSTGARD, Attorney for Appellant,
Address: Juneau, Alaska.

HELLENTHAL & HELLENTHAL, Attorneys for
Appellee,
Address: Juneau, Alaska.

*In the District Court of the District of Alaska, Di-
vision Number One, at Juneau.*

#1239—A.

BEN GUIDONI,

Plaintiff,

vs.

J. H. WHEELER, City Jailer, of the Town of
Juneau, Alaska,

Defendant.

Petition [for a Writ of Habeas Corpus].

Comes now the above-named plaintiff as petitioner
and shows to the Honorable Court, as follows:

That this petitioner is a prisoner in the city jail of
Juneau, Alaska, and as such in the custody of the
above-named defendant, J. H. Wheeler, as City Jailer
of said City of Juneau.

That this petitioner is not imprisoned or restrained
by virtue of a legal order, judgment or process of a
competent tribunal of civil or criminal jurisdiction,
or by virtue of any execution regularly and lawfully
issued upon such judgment or decree.

That the cause or pretense of such imprisonment or

restraint, according to the best knowledge and belief of this petitioner, is as follows, to wit; that heretofore, to wit, on the 4th day of March, A. D. 1915, this petitioner was, without cause or excuse, arrested and placed in the city jail of the Town of Juneau, Alaska.

That on the 5th day of March, A. D. 1915, a complaint was filed in the Municipal Court of the City of Juneau, Alaska, a copy of which complaint is hereto attached, marked Exhibit 1, and hereby made a part hereof.

That on the said 5th day of March, A. D. 1915, this petitioner, while he was illegally and wrongfully restrained of his liberty by this defendant, was tried for the alleged offense [1*] charged in said complaint, before the Municipal Magistrate of the Town of Juneau, without a jury, and by the said Municipal Magistrate pronounced guilty of the said alleged offense, and sentenced to pay a fine of One Hundred (\$100.00) Dollars or to be imprisoned for a term of fifty (50) days.

That said judgment was not filed, recorded or entered by said Municipal Magistrate, and no commitment has been issued under such judgment, as petitioner is informed and verily believes, nor has any warrant been issued under or pursuant to said complaint above referred to.

That at the said trial of this petitioner no witness testified against him under oath or was sworn to testify the truth by any person authorized to administer the oath, nor was any other evidence introduced against the petitioner, nor did the petitioner

*Page-number appearing at foot of page of original certified Record.

admit any guilt or enter any plea of guilty, but that at said pretended trial, the said Municipal Magistrate, as such and not otherwise, administered whatever oaths were administered to any witness.

That the said complaint was not verified or sworn to before any person having authority to administer an oath, nor was any written or verified charge under oath made against this petitioner at or prior to said pretended trial.

That a copy of Section 2 of Ordinance 27 referred to in the complaint, Exhibit 1, hereto attached, is hereto attached marked Exhibit 2, and hereby made a part hereof.

That the petitioner's imprisonment is wholly illegal and without cause or justification in law, in this, that the complaint above referred to is not verified before any person having authority to administer oaths, and that no complaint under oath has been filed or made against this petitioner.

That said complaint does not state facts constituting an offense of any kind or authorizing in any way the arrest or imprisonment of this petitioner. [2]

That the ordinance charged in said complaint to have been violated by the petitioner is null and void and without force and effect, in this, that the Common Council of the Town of Juneau, at the time of the alleged enactment of said ordinance had no authority to enact it or to declare any of the acts therein enumerated a crime or offense punishable by imprisonment or otherwise.

That the common council since the alleged enactment of said ordinance had no authority at any time

to enact it or to declare any of the acts denounced or attempted to be denounced, an offense or crime.

That neither said ordinance nor any law authorized the Municipal Magistrate to impose a sentence of fifty (50) days imprisonment, or any other punishment whatsoever.

That the legality of the imprisonment and restraint of this petitioner has not been already adjudged upon a prior writ of habeas corpus, to the knowledge and belief of this petitioner.

WHEREFORE, your petitioner prays that the writ of habeas corpus will forthwith issue commanding the defendant to produce the petitioner forthwith and to return therewith the time and cause of his imprisonment and restraint before the Court, according to law.

BEN GUIDONI,
Petitioner.

United States of America,
District of Alaska,—ss.

Ben Guidoni, being first duly sworn, deposes and says: That he is the plaintiff and petitioner above named; that he has read the foregoing petition, knows the contents thereof, and that the same is true to the best of his knowledge and belief.

BEN GUIDONI.

Subscribed and sworn to before me this 9th day of March, 1915.

[Seal]

JOHN RUSTGARD,
Notary Public.

My commission expires the 14th day of September, 1918. [3]

Let the writ of habeas corpus issue and be made returnable on the ninth day of March, A. D. 1915, at five o'clock, P. M.

ROBERT W. JENNINGS,
District Judge. [4]

Exhibit No. 1 [to Petition—Complaint].

*In the Municipal Magistrate's Court, for the City of
Juneau, Territory of Alaska, Division No. 1.*

CITY OF JUNEAU,

Plaintiff,

vs.

BEN GUDEL (Italian),

Defendants.

Violation Section No. 2 of Ordinance No. 27 of the
City of Juneau.

Ben Gudel is accused by E. J. Sliter in this complaint, of the misdemeanor of vagrancy committed as follows: The said Ben Gudel did, in the City of Juneau, in the District of Alaska, and within the jurisdiction of this Court, on the 5th day of March, 1915, and for thirty days prior thereto reside within the corporate limits of the City of Juneau, with no visible means of living, or lawful occupation or employment with which to earn a living, and that during said period the said defendant did wander about the streets of Juneau after the hour of eleven o'clock P. M. without a lawful occupation or business, and during said period the said defendant did wander about the streets of Juneau, without lawful business contrary to and in violation of Section No. 2 of Ordi-

nance No. 27 of the City of Juneau, in the District of Alaska, which ordinance was passed and approved by the Common Council of the City of Juneau the 27th day of July, 1903.

E. J. SLITER. [5]

United States of America,
Territory of Alaska,
City of Juneau,—ss.

E. J. Sliter, being first duly sworn, depose and say that I am the person who executed and signed the complaint in the above-entitled and foregoing action; that I have read said complaint, know the contents thereof, and that the same is true.

E. J. SLITER.

Subscribed and sworn to before me this 5th day of March, 1915.

E. W. PETTIT,
Municipal Magistrate for the City of Juneau. [6]

Exhibit No. 2 [to Petition—Section 2 of Ordinance No. 27].

Sec. 2. All persons within the corporate limits of the City of Juneau who have no visible means of living, or lawful occupation or employment by which to earn a living; all healthy persons who shall be found begging the means of support; all persons who habitually roam about the streets without any lawful business; all idle or dissolute persons who live in or about houses of ill-fame; all persons having no known occupation or business, who shall be found wandering about the streets of the City of Juneau after the hour of eleven o'clock at night, shall be deemed vagrants

and, upon conviction thereof before the Municipal Magistrate of the City of Juneau, shall be punished by a fine of not more than one hundred (100) dollars or by imprisonment in the City Jail of the City of Juneau not more than twenty-five (25) days, or by both, in the discretion of the Municipal Magistrate. [7]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 9, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [8]

[Title of District Court and Cause.]

Writ of Habeas Corpus.

United States of America to J. H. Wheeler, City Jailer of Town of Juneau, Greeting:

You, J. H. Wheeler, City Jailer of the Town of Juneau, in the District of Alaska, are hereby commanded to produce the body of Ben Guidoni, restrained and imprisoned by you, and certify and return herewith the time and cause of his imprisonment and restraint, before this Court, on the 9th day of March, A. D. 1915, at the courthouse, in the Town of Juneau, District of Alaska, at five o'clock, P. M., to do and receive what shall then and there be considered concerning the person of him, the said Ben Guidoni.

WITNESS the Honorable ROBERT W. JENNINGS, Judge of the District Court, District of Alaska, Division No. 1 thereof, at Juneau, and the

seal of this Court, this 9th day of March, A. D. 1915.

[Court Seal]

J. W. BELL,

Clerk.

By John T. Reed,

Deputy. [9]

United States of America,

Territory of Alaska,

Division No. 1,—ss.

I hereby certify that I received the within writ of habeas corpus on the 9th day of March, 1915, at Juneau, Alaska, and thereafter that I served the same on the 9th day of March, 1915, at Juneau, Alaska, by delivering a copy thereof, certified to by J. W. Bell, Clerk District Court Division No. One at Juneau, to J. H. Wheeler, City Jailer of the Town of Juneau, personally and in person.

Dated at Juneau, Alaska, March 9, 1915.

Marshal's fees: \$3.00.

Paid by John Rustgard.

H. A. BISHOP,

U. S. Marshal.

By Frank Bach,

Deputy. [10]

[Endorsed]: Filed in the District Court, District of Alaska, First Division, Mar. 9, 1915. J. W. Bell, Clerk. [11]

[Return to Writ of Habeas Corpus.]

[Title of District Court and Cause.]

Comes now the defendant and respectfully submits:

That the Town of Juneau is a municipal corporation duly and regularly organized and existing under and by virtue of the laws of the Territory of Alaska, and as such is possessed of all the rights conferred upon municipal corporations in the Territory of Alaska.

II.

That the defendant is the duly and regularly appointed jailer for said town of Juneau, and that as such jailer, he holds the plaintiff Ben Guidoni in his custody under and by virtue of a judgment duly and regularly entered in the Magistrate Court of said Town of Juneau by the Magistrate thereof on the 5th day of March, 1915, a certified copy of which judgment is attached hereto, hereby referred to and made a part hereof the same as though it were set forth in full.

III.

That the Municipal Court of the Town of Juneau is a competent tribunal of criminal jurisdiction and that the judgment above referred to is a judgment duly and regularly issued according to law by said Court; and that [12] the said plaintiff was committed to the custody of this defendant on the 5th day of March, A. D. 1915, and has since been held by him in custody in the municipal jail of said Town of Juneau, Alaska.

WHEREORE defendant prays that the petition herein be dismissed and that he be allowed his costs.

J. H. WHEELER.

Subscribed and sworn to before the undersigned
this 9th day of March, A. D. 1915.

[Notarial Seal] SIMON HELLENTHAL,

Notary Public for Alaska.

My commission expires November 30, 1917. [13]

[Judgment of Municipal Magistrate.]

*In the Municipal Magistrate's Court for the City of
Juneau, Territory of Alaska.*

No. 950.

Viol. of Sec. 2 of Ord. No. 27.

CITY OF JUNEAU,

vs,

BEN GIDO, *alias* BEN GUDEL (Italian).

March 5, 1915.

The above-named defendant is brought before me
this 5th day of March, 1915, upon a sworn complaint
signed by E. J. Sliter, charging him with the mis-
demeanor of vagrancy; the city being represented by
Simon Hellenthal, Esq., and the defendant appearing
without counsel. Upon the complaint being made
known to the defendant he enters a plea of Not
Guilty, and thereafter both sides being ready for
trial, the following proceedings are had, viz.: John
Ness, J. H. Gilpatrick, Ed Evans and E. J. Sliter are
each duly sworn and testify on behalf of the city and
the city rests, and thereafter the defendant and John
Perreli and Dave Housel are each duly sworn and tes-
tify on behalf of the defendant, and the defendant
rests, and thereafter both sides resting the Court finds

the defendant guilty and fines him in the sum of one hundred dollars, and orders that in case the defendant fails to pay the fine that he be required to serve one day in the Municipal Jail for each two dollars, of said fine not paid, and that during said confinement that the defendant be required to labor for the city under the direction of the Municipal Marshal.

Dated March 5, 1915.

[Seal of City of Juneau] E. W. PETTIT,
Municipal Magistrate.

United States of America,
Territory of Alaska,
City of Juneau,

CERTIFICATE.

I, E. W. Pettit, Municipal Magistrate of the City of [14] Juneau, Territory of Alaska, do hereby certify that that above is a full, true and correct copy of the Judgment in the cause of the City of Juneau vs. Ben Gido, Numbered 950.

Dated at Juneau, Alaska, this 9th day of March, 1915.

E. W. PETTIT,
Municipal Magistrate.

Filed in the District Court, District of Alaska, First Division. Mar. 9, 1915. J. W. Bell, Clerk.
By John T. Reed, Deputy.

[Endorsed]: Original. No. 1239-A. In the District Court for the Territory of Alaska, Division No. 1. Ben Guidoni, Plaintiff, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Defendant. Hellenthal &

Hellenthal, Attorneys for Defendant. Office:
Juneau, Alaska. [15]

[Title of District Court and Cause.]

Reply [to Return to Writ of Habeas Corpus.]

Comes now the above-named plaintiff and for his reply to the return to the writ of habeas corpus herein, shows to the Honorable Court:

That the proceedings referred to in defendant's return is the proceedings described in plaintiff's petition herein.

That the said judgment attached to the return was entered and filed subsequent to the issuance of the writ of habeas corpus herein.

That the complaint, a copy of which is attached to the petition, is the complaint upon which the said alleged trial was had, and upon which the said judgment was entered, and that the ordinance charged in said judgment as violated is the ordinance attached to the petition.

That said judgment is null and void, and of no force and effect for the reason set up in the petition.

JOHN RUSTGARD,

Atty. for Petitioner. [16]

United States of America,
District of Alaska,—ss.

Ben Guidoni, being first duly sworn, deposes and says: That he is the petitioner named in the above-entitled cause, and the foregoing reply is true to the best of his knowledge and belief.

BEN GUIDONI.

Subscribed and sworn to before me this 9th day of March, A. D. 1915.

[Seal]

JOHN RUSTGARD,

Notary Public.

My commission expires the 14th day of September, 1918. [17]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 10, 1915, 4.40 P. M. J. W. Bell, Clerk. By John T. Reed, Deputy. [18]

[Title of District Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED, that on this 9th day of March, being the time set for the return of the writ of habeas corpus heretofore issued herein, the plaintiff appeared in court in the custody of the defendant, and the hearing was proceeded with before Honorable Robert W. Jennings, Judge, under the following stipulations entered into by the respective parties and their counsel:

1. That the defendant is, and was at all times mentioned in the petition for the writ of habeas corpus, the jailer of the Town of Juneau, and that the answer filed herein on the 9th day of March, should be taken and considered as his return to the said writ of habeas corpus.

2. That at all of said times, E. W. Pettit was the Municipal Magistrate of the Town of Juneau, if the Common Council of the Town of Juneau had authority to appoint a municipal magistrate.

3. That the complaint of E. J. Sliter, copy of

which is set forth in the petition for writ of habeas corpus, and the judgment of said E. W. Pettit, copy of which is set forth in the answer herein, constitute the only authority to the said J. H. Wheeler to receive and hold the said petitioner in custody.

4. That the ordinance of the Town of Juneau, copy of which is set forth in said petition, was adopted by the Common Council of the [19] Town of Juneau, and is the basis upon which the judgment of said Pettit was founded.

5. No other or further evidence was presented to the Court and the only points relied upon by petitioner at the hearing to secure his discharge were the following:

1. That the Municipal Magistrate's Court of the Town of Juneau had no legal existence and had no authority to hear, try and adjudicate cases.

2. That the complaint did not state facts constituting an offense, or facts which the Common Council of the Town of Juneau had authority to denounce as crimes.

3. That the Common Council of the Town of Juneau had no authority to denounce vagrancy.

4. That the Town of Juneau had no authority to pass the ordinance in question.

5. That even if the Town of Juneau had authority to pass the ordinance in question and to constitute a police court, still the prisoner should be discharged because the ordinance itself is invalid for that the same is unconstitutional, discriminatory, arbitrary, indefinite, unreasonable and oppressive.

The Court having considered these points, took the

matter under advisement, and on the 18th day of March, rendered its decision, discharging said writ of habeas corpus and remanding the petitioner to the custody from whence he came, to which petitioner duly excepted.

Whereupon the petitioner, indicating that he desired to appeal from said order, asked the Court to grant a supersedeas, pending said appeal, of that portion of the judgment remanding petitioner to the custody from whence he came, and the Court, upon consideration, denied said application for want of authority to grant the same, to which petitioner excepted.

The foregoing bill of exceptions being true and correct is settled, allowed and signed as such.

ROBERT W. JENNINGS,
District Judge. [20]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 24, 1915. J. W. Bell, Clerk. By _____ Deputy. [21]

[Title of District Court and Cause.]

**Order Dismissing Habeas Corpus Proceedings, and
Remanding Petitioner.**

Oral Decision rendered, dismissing proceedings, and remanding Petitioner to the custody of the defendant, J. H. Wheeler, City Jailer of the Town of Juneau, Alaska.

Saturday, March 20, 1915.

ROBERT W. JENNINGS,
District Judge. [22]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of
Juneau, Alaska,

Appellee,

Assignment of Errors.

Comes now the above-named appellant, Ben Guidoni, and assigns the following errors as having been committed by the District Court of Division Number One, District of Alaska, at Juneau, in the proceedings in the above-entitled cause, upon which the appellant intends to, and does, rely in prosecuting his appeal herein.

1st. The Court erred in holding that the Municipal Magistrate's Court of the Town of Juneau was a legally constituted Court and had a legal existence, and had authority to hear, try and adjudicate cases.

2d. The Court erred in holding that the complaint in the Municipal Magistrate's Court, signed by E. J. Sliter, against the said Ben Guidoni, this appellant, stated facts constituting an offense.

3d. The Court erred in holding that the Common Council of the Town of Juneau had authority to denounce as crimes the facts charged in the complaint before the Municipal Magistrate's Court of the Town of Juneau, against this appellant, and signed by E. J. Sliter.

4th. The Court erred in holding that the Common

Council of the Town of Juneau, had authority to denounce vagrancy.

5th. The Court erred in holding that the Common Council of the Town of Juneau had authority to enact ordinance Number 27, and set out in appellant's petition. [31]

6th. The Court erred in holding that the said Ordinance was valid.

7th. The Court erred in holding that the appellant, the plaintiff below, was in the lawful custody of the appellee, the defendant below.

8th. The Court erred in holding that the judgment under which the defendant and appellee claimed the right to the custody of the appellant, was a lawful and valid judgment.

9th. The Court erred in discharging the writ of habeas corpus herein and remanding the appellant to the custody of this appellee.

10th. The Court erred in not holding that Section 2, of the said Ordinance #27, set out in plaintiff's petition, was unconstitutional, discriminatory, arbitrary, indefinite, unreasonable and oppressive.

WHEREFORE, Appellant, the plaintiff below, prays that the said judgment herein entered on the 20th day of March, A. D. 1915, be reversed.

JOHN RUSTGARD,

Attorney for Appellant. [32]

Copy of within Assignment of Errors received and due service of same acknowledged this 24th day of Mch, 1915.

HELLENTHAL & HELLENTHAL,

Attorneys for Appellee.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 24, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [33]

[Endorsed]: No. 2592. United States Circuit Court of Appeals for the Ninth Circuit. Ben Guidoni, Appellant, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed April 1, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk. [34]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of
Juneau, Alaska,

Appellee,

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, that it shall not be necessary or required of the appellant to cause to be printed any

other records transmitted or certified by the Court, to the above-entitled court, except the following, to wit:

Petition for writ of habeas corpus.

Writ of habeas corpus.

Return and answer to writ.

Reply to return and answer.

Opinion of lower court.

Judgment and order remanding plaintiff.

Bill of exceptions, assignment of errors, and this stipulation.

PROVIDED, however, if at the time of the hearing of the above-entitled cause, the Court shall require other documents transmitted in said cause to be printed, it shall be the duty of the appellant to cause the same to be printed.

Dated April 12, 1915.

JOHN RUSTGARD,
Attorney for Appellant.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellee. [35]

[Endorsed]: No. 2592. In the District Court U. S. Circuit Court of Appeals for the Ninth Circuit. Ben Guidoni, Appellant, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, Appellee. Stipulation. Filed Apr. 21, 1915. F. D. Monckton, Clerk.
[36]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1239-A.

BEN GUIDONI,

Plaintiff,

vs.

J. H. WHEELER, City Jailer of the Town of
Juneau, Alaska,

Defendant.

Opinion on Application for Writ of Habeas Corpus.

JENNINGS, Judge.

The contention is made—

1. That the city had no power to establish the police court;
2. That the city had no power to declare what shall be a misdemeanor;
3. That even if those two positions are not well taken, yet the ordinance is void because it is partial, unreasonable and oppressive.

As to the first two points: With all due respect to the former Judge of the Court in the Second Division of Alaska to the effect that the Act of 1904 was a repeal of everything contained in the Act of 1903, I am constrained to differ from his conclusion.

In 36 Cyc., page 1081, Section 2, it is laid down that the doctrine “that a statute is impliedly repealed by a subsequent statute revising the whole matter of the first, does not apply where the revisory statute declares what effect it is intended [1] to have

upon the former, as where it provides that it shall repeal all inconsistent or repugnant acts. In such cases only such effect can be given to the revisory acts as it directs. The enumerated acts are repealed; the others remain in force," and there is a long list of cases cited in support of the text. The Court has not examined all of those cases to see if they bear the text out, but it has had occasion quite often to investigate the law on that subject and is satisfied that the text is well borne out by the authority. But irrespective of the statute of 1903, the fact that the Act of 1904 provides for a police magistrate and gives him jurisdiction of all violations of city ordinances, and the further fact that vagrancy is a well recognized subject of municipal regulation, would seem to point to the fact that ordinances on such subjects, if otherwise unobjectionable, are valid.

The Court has no doubt that the police court is a lawful institution, and it has no doubt that the city can, by proper means, protect itself against vagrants, but that in so doing it must take care that it do not commit a sin against the spirit of liberty and the rights of the citizen cannot be denied.

The city has power to pass by-laws within the limitations of its powers, but those limitations are well known and recognized in the law. They must be impartial, reasonable and not oppressive.

If this ordinance is void, no conviction based upon it can be sustained, and an application in habeas corpus would be the [1½] proper method to be pursued by one suffering restraint by reason of a judgment of which it is the basis; if the ordinance is not

void and the person is in restraint because of a defective complaint or insufficient evidence, habeas corpus will not lie—the party's remedy being by appeal or writ of review. For habeas corpus cannot be made to take the place of those remedies.

3 McQuillan, Sec. 1098.

This much is elementary. That brings us, then, to a determination of the question as to whether or not the ordinance is void.

In the effort to arrive at a correct determination of this question, regard must be had to a variety of conditions and circumstances well established as proper to be taken into consideration, on such an inquiry.

It will hardly be denied that in Juneau there ought to be (if there is not) an enforceable ordinance on the subject of vagrancy. Juneau is a seaport town and is growing rapidly; it is also the center of a rapidly developing mining district and the population is heterogeneous in the extreme. The town is overrun with people who, in the language of Blackstone, "woke on the night and sleep on the day, and haunt customable taverns and ale-houses and rout about, and no man wot from whence they come ne whither they go." Many willing workers have gathered in the town and the adjacent mining centers, seeking honest employment, and great numbers have not been able to find work, but following in the wake of expanding industry has also appeared a multitude of loafers, idlers and blood-sucking parasites who hang upon the flanks of decency and good order with a tenaciousness and destructiveness well nigh appalling. The population is constantly shifting, and some kind of

track and some kind of restraint and supervision are absolutely necessary.

There *is* some kind of regulation on the subject, and the consideration of such as there is, will be approached with a view of making it stand erect unless it shall be manifest that it must utterly fail of its purpose and be relegated to the limbo [2] of useless junk. So we begin with favorable inclinations toward any ordinance or regulation having for its object the extirpation, diminution or regulation of the evils under which we suffer.

It is well to bear in mind, too, that "Municipal government stands midway between the family and the state. It is an aid to both and partakes of the nature of both. Police ordinances are at once family rules on a large scale and state laws on a small scale."

McRea vs. Americus, 59 Ga. 168.

Also, that ordinarily the rigid rules by which the validity of penal statutes are to be tested are not applicable to the by-laws of municipal corporations. "The by-laws of very few of these corporations could stand such test. They should receive a reasonable construction and their terms should not be strictly scrutinized, for the purpose of making them void."

2 McQuillan on Mun. Corp., Sec. 814.

All doubts are resolved in favor of the validity of the ordinance. The presumption is in favor of the validity and the burden is upon the one who asserts its invalidity to demonstrate it.

Idem., Sec. 810, p. 1734.

Ordinances are to be construed in harmony with

the laws and general policy of the state.

2 McQuillan, *Idem*.

“Whether an ordinance be reasonable and consistent with the law or not is a question for the Court, and not for the jury, and evidence to the latter on this subject is inadmissible. But in determining this question the Court will have to regard all the circumstances of the particular city or corporation, object sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated [3] town, or in the country.”

1 Dillon Mun. Corp., Sec. 327.

C. & O. Ry. Co. v. City, 103 Ill. App. 251.

The ordinance in question denounces as vagrants, and provides for the punishment of, all persons falling within any one of the following descriptions, to wit:

1—Those persons within the corporate limits of the City of Juneau who have no visible means of living, or lawful occupation or employment by which to earn a living

2—Those healthy persons who are found begging means of support.

3—Those persons who habitually roam about the streets without any lawful business.

4—Idle or dissolute persons who live in or about houses of ill-fame.

5—Persons having no known occupation or business who shall be found wandering about the streets

of the City of Juneau after the hour of 11 o'clock at night.

An ordinance may be valid in some of its provisions and void in others; therefore it is not necessary to consider whether the entire ordinance is void, but only as to whether those portions of it which are pertinent to the case at bar are void.

(2 McQuillan, sec. 816, p. 1743.)

The only portions of the ordinance that are pertinent to the case at bar are those involved in the charge which underlies the judgment. That charge is referable only to the first and fifth classes of people mentioned in the ordinance.

The defendant is charged with being a man with no visible means of living, or lawful occupation or employment with which to earn a living. This charge is in the very words of the ordinance. He is also charged with "wandering about the streets of Juneau after the hour of 11 o'clock P. M. without a lawful occupation or business." Supposedly this means to charge a crime under the fifth classification appearing above, to wit: Wandering about the streets after the hour of 11 o'clock at night "having no known occupation or business." [4]

We will first consider the first sentence of this ordinance. The language used in that first sentence, to wit: "All persons having no visible means of support or lawful occupation or employment by means of which to earn a living" employs the words which have been used, time out of mind, to describe a vagrant—

And yet even a cursory reflection and analysis is

sufficient to demonstrate that not only are those words *not* sufficient to describe vagrancy, *but also* that many individuals worthy and unfortunate who are not reprehensible at all and whom it would be a misnomer, a slander and a gross injustice to call vagrants, would fall within the strict meaning of said words.

For instance: A person may have a lawful occupation and may have visible means of support, and yet he may be a vagrant on account of the fact that he will not work at his occupation and will not spend his own money to support himself, but prefers to wander around begging, or consorting with disreputables, or seeking whom and what he may devour, and making a general nuisance of himself.

Again—A man having no *visible* means of support is not necessarily a vagrant—He may have the wealth of Croesus and yet that wealth may not be visible; nor is a man who has no lawful occupation or employment by which to earn the means of living, necessarily a vagrant, for he may have plenty of money and yet no occupation. Nor is a man who is without visible means and is also without a lawful occupation or employment necessarily a vagrant, for as before said, although he have no lawful occupation and no lawful employment and no visible means, yet if he have enough *invisible* means to support himself he could hardly be taken up as a vagrant, if he have no *other* qualifications, whether he has or has not a lawful occupation or employment.

Again—A man may have no means of support, visible or invisible, and no occupation or employment

by which to earn the means of living, and yet not be a vagrant. He may be an honest laborer out of a job and destitute of means, yet looking for a job and [5] able and willing to work but unable to find any work to do. Such a man is not, and never has been held to be, a vagrant, and the language used to describe vagrancy has never been held to include him, and yet if the language be strictly construed he would come within its purview.

So, it appears the language used is too broad because it embraces those who may be innocent and worthy, and is too narrow because it fails to embrace all who come within the spirit of the term vagrant. Nevertheless, such language, although manifestly inapt, has, through all the years, been taken to describe a vagrant. This is because something which is not in the language has always been read into it, so that, considering as a part of the language what has been read into it, the language itself has come to have an artificial meaning, and that artificial meaning may be expressed thus: "Whoever is without means of support or lawful occupation or employment by means of which support can be obtained and who conducts himself in such a manner as to be a detriment to the peace and order, or offend the sense of decency, or shock the morals, of the community, is a vagrant."

This reading into a statute or an ordinance of things consonant to the spirit, although not found in the letter, is no new thing in construction—It is one of the well-known canons of construction. It is aptly expressed in the good book, "Not of the letter but of

the spirit; for the letter killeth but the spirit giveth life"; and the cases are too numerous to mention, where language has been construed to mean what the spirit signifies and not merely what the language imports—For instance: The language of the National Constitution is that no man shall be convicted of a crime except by the verdict of a jury. The Congress undertook to say that in Alaska in misdemeanor cases a jury of six was sufficient—A defendant in a misdemeanor case demanded a jury of twelve and upon that being denied him, took appeal. The Supreme Court of the United States read into the Constitution the words "a jury of twelve."

U. S. v. Rasmussen, 197 U. S. 516. [6]

The Court said in substance that what the Constitution makers must have meant was a jury of twelve—that that was the only jury they knew anything about—a common law jury.

The most notable of recent instances of reading things into the letter of the statute so that the spirit should shine forth, occurs in the opinion of the Supreme Court of the United States in the Standard Oil case. There the word "unreasonable" was read into the language "combination in restraint of trade," so that it is made to read "combination in unreasonable restraint of trade." This was justified by reason of the fact that in the light of history and past adjudications "restraint of trade" meant unreasonable restraint of trade—As said by the Chief Justice, "Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made

them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable, the contract was held to be void." Therefore, construing it according to the rule of reason and in the light of history and attending circumstances, a statute which in words made unlawful all combinations in restraint of trade, came to mean *not* all combinations, but *only those* combinations which were not partial in their operations and which were otherwise reasonable. Here a whole clause was, by the spirit, supplied to the language.

Standard Oil Co. vs. U. S., 221 U. S. 1.

As further illustrating—a statute of the State of Washington provided that all places "where women are employed to draw custom and to dance" were nuisances and might be abated and the proprietors prosecuted. Now, it is perfectly evident that by a strict literal construction of that statute the promoter of exhibitions wherein Pavlova or Isadora Duncan or Loie Fuller [7] perform, would be in the same category as the keeper of a dance hall where women are employed to draw customers to the bar to take a drink after each performance. Certainly such was not the intention of the Legislature of the State of Washington. The spirit of the law was to discountenance and discourage only such exhibitions as were carried on in such a way as to shock the morals of the community. The case came up on appeal

(not habeas corpus). So the Supreme Court of the State read that meaning into the statute, saying:

“It is further contended by the appellant that the information is fatally defective in not showing that the manner of ‘drawing custom’ and of dancing, for which the women are alleged to have been employed, was such as to shock the moral sense, or to interfere with the peace and good order of the community, or in any manner whatever to affect the community, or to constitute a nuisance. That portion of the information to which appellant’s objection is directed follows the language of the statute, and is consequently sufficient, unless the words used are so general as to include cases not intended by the legislature to be included in the statute. If, therefore, women may, within the meaning of the statute, in any case lawfully be employed in any place of resort to draw custom or to dance, then the information should have stated facts showing that this was not one of those cases, notwithstanding the language of the law suggests no exception. It is the intention of the legislature that is to be determined in the construction of statutes, and in arriving at the intention it is sometimes necessary to restrict the meaning of the language used by the lawmakers so as not to include therein all that the words express. ‘It is a familiar canon of construction that the thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter

of the statute is not within the statute unless it be within the intention of the makers.' *Riggs v. Palmer* (N. Y. App.), 22 N. E. Rep. 189. It was evidently the object and intention of the legislature, in passing the statute under consideration, to punish all persons engaged in any business which openly outrages decency and tends to corrupt the public morals, and not to condemn the employing of women, in all cases, even for the purpose of drawing custom and dancing, regardless of the effect thereof upon the community. At common law, all public shows of a scandalous and demoralizing character were nuisances, without regard to whether the persons participating therein were men or women, while theaters and other places of innocent amusement were favorably recognized. Taken literally, the language of our statute would authorize the punishment of all [theatrical managers who open their doors, and permit the public to enter and witness the performance of even the greatest of female histrionic or terpsichorean celebrities; yet no one would for a moment consider that such was the intention of the legislature.*****

We are therefore of the opinion that the information in this case should have gone further, and shown that the character of the women alleged to have been employed, or the manner of their deportment and quality and character of conversation, was such as tended to draw together crowds of disorderly persons, or to debauch the morals of those resorting to the place.

Liquor selling is recognized by our law as a legitimate vocation, and we think that even a woman may be employed in a saloon without thereby necessarily rendering the place a 'nuisance,' within the meaning of the statute in question."

State vs. Brosn, 34 P. R., 132. [8]

Says one author: "The ordinance will be construed according to its reason and spirit. A literal interpretation will be rejected if such would defeat its purpose. In construction words will sometimes be rejected. Words of an ordinance are construed the same as words of a statute. The legislative intent will control the construction of a word in an ordinance though the word is inappropriate."

2 McQuillan, p. 1741.

And so into this ordinance, words notwithstanding, there must be read the spirit of the law—there must be read the meaning which the words had originally and which through long years they have stood for and what they stand for now—there must be read into it all the tenor of our institutions, the conditions of society, the evils to be remedied, the ends to be accomplished, the general policy and history of the people, all the harmony of the law, and the common sense of our ancestors and of ourselves. There are many constitutions and statutes and ordinances which taken literally lead to glaring absurdities, but which, when read in the light of the spirit, are radiant with justice and benevolence and common sense.

Such an ordinance is this. Reading the spirit and not the letter, there is no difficulty. The indigent but unemployed honest man has nothing to fear from

it—It is not aimed in his direction. It never was aimed in his direction—It will not hit him except by inadvertence—It is true that under it mistakes may sometimes be made and the innocent suffer—But when was this otherwise? At what stage of the world's history was it that human institutions became infallible—in what decade have mistakes not been made? And he who would devise a scheme by which the innocent will *never* suffer for the sins of others deserves and will receive “a monument more lasting than brass and higher than the royal altitude of the pyramids.” Many an innocent man has been hanged for a murder which he never committed—Shall we, on that account, abandon all prosecutions [9] for murder? Many a man has been sent to prison for another man's crime—shall we, on that account, abolish all the jails?

It is true that under the strict letter of this ordinance an honest working man may sometimes suffer but shall we, on that account, give over the city to pimps, macques, harpies, loafers, petty thieves and leering mashers?

If the ordinance is read according to the strict letter, such an alternative might arise, but if it be read according to its spirit no such dilemma confronts us. Read according to its spirit, the honest man is as safe as he ordinarily is under our necessarily defective institutions, and it is only the parasite and the degenerate who needs slink out of sight at the approach of the officers of the law. Such men, when apprehended, are always the first to invoke those principles of law and liberty which they habitually

despise and disregard. Such is "the homage which vice pays to virtue."

All good citizens must take their chances—They have to take them as to all other prosecutions. Each is liable to be arrested on any charge and to be tried before a jury, to ascertain whether or not he has committed the crime with which he is charged; sometimes, no doubt, a worthy citizen will be unjustly arrested or convicted under this ordinance, but the ordinance is not on that account alone to be held void.

An ordinance may be too comprehensive in its provisions and cover cases which the city has no power to control, but that is no reason why courts should refuse to enforce it in cases over which the jurisdiction of the local corporation is unquestioned.

An ordinance operating unreasonably and oppressively in particular cases only, may be enforced except in such cases.

An ordinance that may operate reasonable in some instances and unreasonable in others is not wholly void and will not be set aside in toto.

87 Atl. 463.

The reasonableness is not to be tested by application to [10] extreme cases.

29 N. E. 1146.

28 Pa., 258.

The Court therefore holds that this ordinance is not void. When certain things are shown in evidence, the letter of the ordinance will not apply, because the spirit will kill the letter; in such cases the defendant will not be held to have violated the ordinance and cannot legally be punished. It may be a fact that

the petitioner in this case has not violated the ordinance; the court which tried him, however, says that he did. That Court heard the evidence. This Court cannot, without hearing evidence, say that he did not violate the ordinance. Let him appeal, as he has a right to do—On such an appeal it will be determined whether or not the facts shown in evidence expose him to the sanction of the ordinance as read in letter and spirit.

Petitioner having been charged with doing the things prohibited by that sentence of the ordinance which we have been considering, and having been found guilty, it will be unnecessary to advert to the question as to whether or not he could be held had he been convicted only under the fifth classification of persons deemed to be vagrants.

Cases have been cited by the learned counsel for petitioner in which convictions have been annulled when made on ordinances more or less similar to that in question here. In each instance but one, the case came up on appeal and the Court decided that, as applied to the evidence in the particular case under consideration there, it would be unconscionable to sustain the conviction because, as so applied, the ordinance was discriminatory, or unreasonable or oppressive or open to some other cogent objection appearing in the proceedings. But we have seen that each case stands upon its own footing and that “the reasonableness is not to be tested by application to extreme cases.”

Only one of the cases cited by counsel for petitioner was on habeas corpus—that was in *re Frasee*—

the Salvation Army [11] case, and the reason the ordinance in that case was held void was because the common council had delegated to an individual, the Mayor, the sole power, the arbitrary power, the unappealable power, to say who should and who should not parade the public street—no rules had been prescribed—the whole matter was left to the whim of one man, and to parade without that one man's permission was a misdemeanor. He could give or withhold his permission as favor, anger, hatred, or caprice dictated—no wonder the writ of habeas corpus was granted.

The proceedings are dismissed, and petitioner remanded to the custody of the City Jailer.

[Endorsed]: No. 1239-A. In the District Court for the District of Alaska, Division No. One. Ben Guidoni, Plaintiff, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, Defendant. Opinion on Application for Writ of Habeas Corpus. Filed in the District Court, District of Alaska, First Division. Mar. 20, 1915. J. W. Bell, Clerk. [12]

[Title of District Court and Cause.]

Praeipie [for Certified Copy of Opinion].

To the Clerk of the Above-entitled Court:

Please transmit to the Circuit Court of Appeals of the Ninth Circuit at San Francisco a certified copy of the Court's opinion in the above-entitled cause.

Respectfully,

JOHN RUSTGARD,

Attorney for Plaintiff and Appellant.

[Endorsed]: No. —. In the District Court, Division No. 1, Territory of Alaska. Ben Guidoni, Plaintiff, vs. J. H. Wheeler, City Jailer of the Town of Juneau, Alaska, defendant. Praeceptum. John Rustgard, Attorney for Plaintiff and Appellant. Filed in the District Court, District of Alaska, First Division. Apr. 4, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [13]

[Title of District Court and Cause.]

**[Certificate of Clerk U. S. District Court to Certified
Copy of Opinion.]**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing twelve pages of type-written and written matter, numbered from 1 to 12, both inclusive, constitute a full, true and correct copy, and the whole thereof, of OPINION ON APPLICATION FOR WRIT OF HABEAS CORPUS, in Cause No. 1239-A, wherein Ben Guidoni is Plaintiff and Appellant and J. H. Wheeler, City Jailer of the town of Juneau, Alaska, is Defendant and Appellee, as called for in the Praeceptum of Appellant, copy of which is attached hereto and made a part hereof.

I further certify that said copies of Opinion and Praeceptum were prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Seven Dollars and Ten Cents (\$7.10), has been paid to me by John Rustgard, Attorney for Plaintiff and Appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court, at Juneau, Alaska, this 15th day of April, 1915.

[Seal]

J. W. BELL,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: No. 2592. United States Circuit Court of Appeals for the Ninth Circuit. Ben Guidoni vs. J. H. Wheeler, City Jailer of Town of Juneau, Alaska. Certified Copy of Opinion of Jennings, D. J. On Application for Writ of Habeas Corpus. Filed Apr. 21, 1915. F. D. Monckton, Clerk.

14
No. 2592

United States
Circuit Court of Appeals

For the Ninth Circuit

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of Juneau, Alaska,
Appellee.

Brief for Appellant

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1

JOHN RUSTGARD,

Attorney for Appellant.

United States
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BEN GUIDONI,

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Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1

JOHN RUSTGARD,

Attorney for Appellant.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal under Section 1440, Compiled Laws of Alaska, from an order discharging a writ of habeas corpus and remanding the plaintiff (appellant) to the custody of defendant.

Plaintiff was arrested under a complaint charging vagrancy in violation of an ordinance of the town of Juneau, Alaska, and was prosecuted before the municipal magistrate of that town. He was in that proceeding convicted and sentenced to pay a fine of \$100, in default of which he was incarcerated for a term of fifty days. A writ of habeas corpus was sued out before the District Court and after a trial the writ was discharged and the prisoner remanded to the custody of the said jailer.

Plaintiff contends that the imprisonment is unlawful, because:

1—The municipal magistrate is vested with no judicial functions, has no authority to hear and determine causes or to order imprisonments; in brief, that the magistrate's court of the town of Juneau has no legal existence.

2—The ordinance under which the prosecution was had is void for the reason that the town had no authority to declare the acts therein denounced a crime.

The complaint charges that the vagrancy consisted in this, that defendant did "reside within the corporate limits of the city of Juneau, with no visible means of living or lawful occupation or employment with which to earn a living, and that during said period the said defendant did wander about the streets of Juneau after the hour of eleven o'clock P. M., without a lawful occupation or business."

The ordinance denounces other acts besides those recited in the complaint, but here we deal only with those acts for which appellant is incarcerated.

Appellant contends that the City Council has no authority to declare such acts criminal, for the following reasons:

(1) The town has no express authority to penalize vagrancy, and where, as in Alaska, the general Penal Code defines vagrancy and declares it a crime for the entire Territory, both within and without the limits of municipalities, no concurrent jurisdiction on the part of the municipality can be implied.

(2) The general welfare clause of the municipal charter does not confer concurrent authority over crimes denounced by the Code. Clear *express* authority is essential in such cases.

(3) In addition to the general welfare clause of the municipal charter that document enumerates

certain specific instances where the common council may legislate on subjects already covered by the Penal Code. This enumeration must be held exclusive under the doctrine of *expressio unius est exclusio alterius*.

(4) Under the general welfare clause, the municipality can denounce only such acts as are nuisances *per se*.

(5) Even if the ordinance were, in its general scope, within the power of the city to enact, it is void as unreasonable, oppressive and inequitable:

(a) The declaration in the ordinance that "all persons living within the corporate limits of the city of Juneau, who have no visible means of living or lawful occupation or employment by which to earn a living * * * shall be deemed vagrants," attempts to denounce that as a crime which is not a nuisance *per se*,—nor even morally wrong, but at most only a misfortune.

(b) The other declaration of the ordinance that "all persons, having no known occupation or business, who shall be found wandering about the streets of the city of Juneau after the hour of eleven o'clock at night, shall be deemed vagrants," is void for the reason that a man without a job has just as good rights to wander upon the streets as a man with a job, and, moreover, the crime consists in being found wandering and not in wandering.

ARGUMENT

I.

THE MAGISTRATE'S COURT HAS NO LEGAL STATUS.

All the laws relating to municipal corporations in Alaska are contained in 33 Stat. L. Ch. 1778.

The only references in this codification to the alleged municipal magistrate's court are as follows:

Section 627 of the Compiled Laws of Alaska provides:

"That the common council shall have and exercise the following powers: * * * Second, to appoint * * * a municipal magistrate."

Sub-section 10 of the same section provides:

"The municipal magistrate shall have jurisdiction of all cases for violations of municipal ordinances and appeals shall lie from his judgments to the District Court in the same manner as appeals from the judgments of ex officio justices of the peace."

These provisions do not create a judicial tribunal. To create a court of justice it is necessary to do more than to give the thing a name. Three things are indispensable, (1) to define the jurisdiction; (2) to prescribe the manner in which jurisdiction may be acquired over the person; (3) to define the manner in which that jurisdiction is to be exercised.

From the above quotations it can only be infer-

entially assumed that the magistrate shall have authority to hear evidence pro and con and render judgment of guilt or innocence. But not even inferentially can it be determined whether it is necessary to file charges against the defendant, either written or oral, whether he may be personally present in court, whether he may be held on a warrant issued by the magistrate, whether the warrant issued must be supported by a verified complaint, whether the magistrate may issue subpoenas or compel otherwise the attendance of witnesses, whether he has authority to administer oaths, whether he may issue commitments, or do any of the many other acts proper, if not indispensable, to the proper administration of justice.

The council has been given no authority to enact rules for the alleged magistrate's court, nor has the magistrate himself been given such authority.

Nor is there anything in the name "magistrate" to indicate that he is a judicial officer. The term is applied generally to administrative officers, from the mayor of a town to the president of the United States.

The question was so carefully discussed in a parallel case which arose in Colorado, that it is deemed sufficient here to simply refer this court to that decision :

Ex rel Curley, 5 Colo., 412.

If, by way of illustration, it is supposed that the legislature enacted a law providing that Juneau

shall be a municipality, with municipal jurisdiction within its boundaries, could it be presumed that this would create anything or confer any power

Even if the law went farther and provided that there should be a common council with legislative power, and a mayor with executive power, would not those be equally futile?

Not only have public officers only such power as is conferred upon them, but they can execute that power only in the manner provided by law.

It will of course be admitted that in order to constitute a judicial tribunal under the fifth amendment to the Constitution, it is indispensable that both parties to an action, whether civil or criminal, be given an opportunity to be heard. But this is not all. It is indispensable that the law creating a tribunal provide for the manner and method of hailing both parties before it. The sixth amendment to the Constitution gives the defendant in a criminal case the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor". The Act here in question does not provide the means whereby any of these provisions may be complied with.

It is answered that the alleged magistrate has the authority to improvise those means. Such power is admittedly not expressed, and it cannot be implied.

"Where a judgment is void without notice,

and the law under which the proceeding is had requires no notice, such notice can not be implied."

Stewart vs. Palmer, 30 Am. Rep., 290.

There is a striking analogy between municipal tribunals and a board authorized to assess and levy taxes. Both are judicial tribunals with jurisdiction confined to special subjects. The principle involved in the case at bar has frequently been passed upon involving the proceedings before tax commissioners.

It is well settled that tax laws which provide no notice to taxpayers, giving them opportunity to be heard, are void, and such notice and opportunity cannot be supplied by the assessor in the absence of provisions for them in the statute itself.

Stewart vs. Palmer, *supra*.;

Railroad Tax Cases, 13 Fed., 722 (750);

Kuntz vs. Sumption, 2 L. R. A., 655;

Campbell vs. Dwiggins, 83 Ind., 473;

Jackson vs. State, 104 Ind., 516;

Garvin vs. Daussman, 16 N. E. 826.

"It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity of the law is to be tested not by what

has been done under it, but by what may by its authority be done. The legislature may prescribe the kind of notice and the method in which it shall be given, but it cannot dispense with all notice."

Stewart vs. Palmer, supra.

"The statute does not provide for notice to taxpayers whose taxes it is proposed to increase, and this infirmity destroys it. It is not enough that in fact the taxpayer does have some notice or information, for the law must provide for notice, or else no legal notice can be given. A man may be subpoenaed as a witness in an action pending against him, but unless he is summoned or notified as a party under some law authorizing a summons or a notice, the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending, but if there is no law authorizing the notice, it will be unavailing. A notice not authorized by law is in legal contemplation no notice."

Kuntz vs. Sumption, supra.

"It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage of the proceeding."

Garvin vs. Daussman, supra.

It is also well settled that in proceedings to con-

demn property under the power of eminent domain, the same rule holds good. Not only is notice required, but the law authorizing the proceeding must prescribe the manner of giving notice and the manner of affording a hearing to the property owner.

Lewis on Eminent Domain, Par. 368.

By virtue of this principle, the Act giving the municipal magistrate jurisdiction over violations of municipal ordinances, is void because it fails to prescribe the manner in which the jurisdiction is to be exercised, fails to provide the means for hailing defendants into court, and fails to provide for a hearing.

II.

CONGRESSIONAL ENACTMENT CONFERRING POWERS ON TOWNS.

A.

Original Enactments.

The town of Juneau is organized under the general laws of Congress relating to Alaska.

The first legislation on the subject is found in Ch. 21 of Title V. of Act of June 6, 1900, (Carter's Code, pp. 393-4.)

Sec. 201, p. 394, Carter's Code, defines the powers of the common council. This law did not authorize the town to penalize any act prohibited by the coun-

cil. In the absence of express authority to do so, the power to enact penal ordinance does not exist.

City of Owensboro vs. Sparks, 36 S. W., 4.

This defect was attempted to be remedied by the Act of March 2, 1903, (32 Stat. L., Ch. 978, p. 944.)

Section 3 of that act defines the powers of the common council.

Sub-section 5 authorizes the council "by ordinance to declare what shall be a misdemeanor."

Sub-section 11 empowers the council "by ordinance to provide reasonable punishment for the violation of municipal ordinance, by fine or imprisonment or both."

The lower court held that this gave the town a jurisdiction concurrent with Congress and authorized it to declare not only all those acts misdemeanors which were so under the general Penal Code, but to declare any other act a crime which the council at their pleasure, should see fit to penalize.

If this be so, the town can legislate on anything from murder to assault, from forgery to petty larceny,—the whole field of criminal jurisprudence.

But this interpretation will not stand the test either of reason or authority.

My contention is that this clause of the law of 1903 was intended only to cure the defect in the law of 1900, and to give the council authority to penalize those acts over which the town had been, by other provisions, either expressly or by necessary implication, given jurisdiction.

B.

Repeal of Law of 1903.

In 1904, Congress passed an Act entitled: "An Act to amend and codify the laws relating to municipal corporations in the District of Alaska."

33 Stat. L., Ch. 1778, p. 529.

This law appears as Ch. 21, of Compiled Laws of Alaska, (pp. 315 to 322).

This act was expressly and obviously intended as a codification and amendment of previous legislation on the subject.

It covers all features of municipal government attempted to be covered by previous enactments as well as some new features.

The court below held, however, that this law does not repeal the law of 1903. I maintain that it does.

Inasmuch as the lower court also contended that the validity of the ordinance here in question rests upon the powers granted by the law of 1903, but not embodied in the subsequent legislation, this point is a crucial question in this case.

Section 4 of the last act provides: "That the said common council shall have and exercise the following powers," and then proceeds to enumerate *seriatim* what those powers shall be. In this enumeration recur most of the powers conferred by the law of 1903, together with many new and additional powers, but the clause "to declare what shall be a misdemeanor" has been omitted.

The court below contends that, by omitting to enumerate some powers in the new section defining the powers of the council, Congress meant to indicate that it wished to retain them in force as originally enacted in 1903. This might find support in reason if the new section had omitted all the powers of the old law and enumerated only the new powers intended to be conferred; but when the majority of the old powers were included in the new enumeration, it seems obvious that the new law was intended to be exclusive and to embrace all of the powers which Congress intended to confer. In other words, that the new law is a codification and amendment in fact, as the title declares and as the opening paragraph of Section 4 indicates.

This doctrine is in conformity with both reason and authority:

“But the general rule seems to be that statutes and parts of statutes omitted from a revision are to be considered as annulled and are not to be revived by construction.”

Endlich on the Interpretation of Statutes,
Sec. 203, pp. 271-2;

Brocken vs. Smith, 39 N. J. Eq., 169;

Ellis vs. Paige, 1 Pick. (Mass.), 43-5;

Rutland vs. Mendon, Id., 54.

“Where a statute is evidently intended to revise the whole subject treated in a former statute and to be substituted therefor, it repeals such former statute.”

Sedgwick on Construction of Statutes and Constitutional Law, p. 365.

"Where one act is framed from another, some parts taken and others omitted, the later act operates without any repealing clause as a repeal of the first."

Sutherland on Stat. Const., p. 209.

"Sections omitted in a revision are not revived but annulled."

Pingree vs. Snell, 42 Me., 53.

"It is a well settled rule, that when any statute is revised, or one act framed from another, *some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled.* To hold otherwise would be to impute to the legislature gross carelessness or ignorance, which is altogether inadmissible. We are not therefore at liberty to suppose that the proviso or exception in the provincial statute was omitted by mistake."

Ellis vs. Paige, 1 Pick, (Mass.), 45.

As was said by the Supreme Court of Chancery of New Jersey, in *Bracken vs. Smith*, 39 N. J. Eq., 171, relating to a similar condition, and referring to the later act revising a former act on the same subject:

"By the passage of that act, the legislature intended, as I think, to gather up and incorporate in a single act all the prior legislation that they thought worth preserving, and to sweep

the rest away. The legal rule which must control the decision of the case is perfectly well settled. **** Where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *United States vs Tynen*, 11 Wall., 88. Mr. Justice Van Syckle, in *Roche vs. Jersey City*, 11 Vr. 257, 259, said: "This rule does not rest strictly upon the ground of repeal by implication, *but upon the principle that when the legislature makes a revision of a particular statute and frames a new statute upon the subject-matter, and from the frame-work of the act it is apparent that the legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded.* It is decisive evidence of an intention to prescribe the provisions mentioned in the later act as the only ones on that subject which shall be obligatory.

"It is sound law, we think, and no authorities can be found that will controvert it, that a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, must operate to repeal the former, although it contains no words to that effect."

The case of *Ripley vs. Gifford*, 11 Iowa, 367, is in point. There the legislature omitted in revising the Code to provide a "fee bill" to guide in the charging of fees by municipal officers. It was contended that because of such omission, the old fee bill was in force and should be followed, but in denying such contention the Supreme Court of Iowa uses the following pertinent language:

"The rule that the real intention of the legislature, when ascertained, will prevail over the literal sense has no application. The legislative act unmistakably fails to provide for the compensation of these officers. There is no obscurity; nothing left in doubt. There is no language that we are called upon to construe. It is simply a *casus omissus*, and we can not presume because the general assembly ought to have provided a 'fee bill', that they would, therefore, have re-enacted the old one, any more than we can presume they would have enacted another and different one. To say that chapter 136 is still in force, would be most palpable judicial legislation. *The legislative will is frequently as clearly shown by omission to legislate upon a given subject, as by the use of language the most positive and explicit.* It is our duty to declare the law, that of the legislature to make it. Our province is not by interpretation and construction to supply an omission, any more than it is to declare the law otherwise than we find

it, when the language used is clear, explicit and positive. The duty of courts in this respect is too well and uniformly settled to permit a departure from it, however great the necessity or pressing the exigency.

“The consequences to result from this view have been strongly urged by those claiming that the legislature intended to re-enact the old law. With these consequences we have nothing to do, in a case so free from doubt and uncertainty.”

This is not a new question in this jurisdiction. Shortly after the enactment of the codification of 1904, Judge Moore, of the Second Judicial Division of Alaska, in the *Town of Nome vs. Schneider*, 3 Alaska Report, 60, held that the powers conferred on the town by the law of 1903 were absolutely superseded by the codification.

In that case it was decided that the authority to impose license taxes, conferred by the law of 1903, must be deemed repealed by the law of 1904, by reason of the fact that such authority was excluded from the codification.

This court considered the same subject in *Freed-ing vs. Allen*, 173, Federal, 263.

While Judge Moore held that the law of 1904 abrogated all former powers held by the town council not re-enacted by the law of 1904, he yet maintained that the authority of the District Court to apportion license funds (collected from Federal licenses) be-

tween the school board and the common council pursuant to the law of 1903, was not abrogated by the codification of the subsequent year, but upon appeal this court held that the codification was such a complete revision of the whole system of municipal government, that even the authority bestowed on the court by the older acts was deemed revoked.

From the time Judge Moore, more than ten years ago, held that powers conferred on the town by the act of 1903, were revoked by the condification, no municipality has ever questioned the correctness of that ruling.

In conformity with this view, the compilation of the laws of Alaska, authorized by Congress in 1913, omits any reference to the law of 1903. So does the compiler of Federal Statutes Annotated.

The ordinance here under discussion was enacted in July, 1903. Even if it were valid under the law then existing, it became void when the power upon which it rests was revoked.

28 Cyc. 273-4.

Southport vs. Ogden, 23 Conn., 127.

III.

AUTHORITY UNDER LAW OF 1904.

A.

General Powers.

The question, then, is whether or not the law of 1904 authorizes the town to penalize vagrancy, assuming, *arguendo*, that any of the acts charged constitute vagrancy.

Sub-section 10 of section 4 of Act of 1904, authorizes the council "to prohibit drunkenness, gambling, houses or places of ill-fame, disorderly conduct or conduct endangering the public peace, public health or public safety; to define such offenses and prescribe the punishment therefor."

Sub-section 13 confers authority "to take such action by ordinance, resolution, or otherwise, as may be necessary to protect and preserve the lives, the health, the safety and the well-being of the people in the town, and to publish all ordinances."

Aside from the express power to punish "drunkenness," "gambling" and "houses or places of ill-fame", there is no authority granted in these provisions, except such power as is conferred by what is usually termed the "general welfare clause" of city or town charters.

Such general power to protect the health of the community and preserve the peace of the town gives authority only to inhibit such acts as are public nuisances in themselves.

The authority to protect health and life does not authorize any town to provide for boiler inspection, on the theory that in the absence of such inspection dangerous explosions may occur.

State vs. Robertson, 40 Am. St. R. 275.

Nor does the general welfare clause authorize a town to penalize assault and battery except when committed in a public place.

State vs. Brinkhauser, 3 N. W. 695.

Nor does the general welfare clause authorize the town to penalize private lewdness.

State vs. Hammond, 41 N. W. 243.

Nor the use of profane language in a private place.

State vs. Horne, 20 S. E. 443.

Nor to provide closing hours or closing days for stores or shops.

Cornwallis vs. Carlisle, 10 Org. 139 (143).

Watson vs. Thompson, 94 Am. St. R. 139.

State vs. Ray, 42 S. E. 960.

Nor to prohibit smoking of tobacco.

City of Zion vs. Behrends, 104 N. E. 836.

Nor does express authority to define nuisances, authorize that to be declared a nuisance, which is not so *per se*.

Village vs. Poyer, 5 Am. St. R. 524.

B.

No Concurrent Jurisdiction Implied.

In order to sustain the authority of the town to inhibit vagrancy, this court must hold that, under these *general* powers, the town has an implied authority to penalize those acts which are already denounced by Congress in the Penal Code.

Section 2031, Compiled Laws of Alaska, defines vagrancy and prescribes the punishment.

Congress in this section provides "That all *idle* or *dissolute* persons who have no visible means of living, or lawful occupation or employment by which to earn a living ***** shall be deemed vagrants."

The town of Juneau re-enacted this statute but struck out the words "idle" and "dissolute" and then inflicted the same punishment upon anybody who should be without a job, whether he was an idler or not.

The general doctrine is that the courts will not hold that the municipality has any authority to denounce an act as a crime which has already been so denounced by the state legislature, unless such concurrent authority is specifically conferred in *express* and unequivocal language.

A municipality has no other power than such as is expressly granted, and such other power as is necessary (not only convenient but necessary) to the powers expressly granted.

Where there is a doubt, that doubt must be resolved against a municipality.

The court will not infer the grant of a power which has already been and is exercised by the sovereign.

Where Congress has fully legislated on a subject, there can be no presumption from general grants that it intends to give concurrent jurisdiction over the same subject to the municipality.

City of Cornwallis vs. Carlisle, 10 Ore., 139;

In re Sic, 14 Pac., 405;

Ex parte Smith, Fed. Cas. No. 12, 967 a;

Thrower vs. City of Attica, 52 S. E., 76;

Moran vs. City of Atlanta, 30 S. E., 298;

Ex parte Wickson, 47 S. E., 643;

Judy vs. Lashly, 41 S. E., 197;

State vs. Godfrey, 46 S. E., 185;

State vs. McCoy, 21 S. E., 690;

In re Baxter, 12 R. I., 13;

Ex parte Bourgeois, 60 Miss., 663;

45 Am. St. R., 420;

Southport vs. Ogden, 23 Conn., 127;

Loeb vs. City of Attica, 82 Ind., 173;

42 Am. Rep., 494;

City of Owensboro vs. Sparks, 36 S. W., 4;

State vs. Welch, 36 Conn., 215;

Jefferson City vs. Courtmid, 9 Mo., 692;

Kansas City vs. Neal, 49 Mo. App., 72;

Town vs. Hammond, 76 N. C., 33;

State vs. Keith, 94 N. C., 933; .

Kassell vs. City, 35 S. E., 147;

State vs. Brinkhauser, 3 N. W., 695;

People vs. Brown, 2 Utah, 462.

A few expressions from the courts on this subject are here submitted:

“We are confronted with the broader question whether the ordinance was invalid, in that it undertook to make penal that which was already prohibited by the state law * * * and the familiar principle that a municipality may not prohibit by ordinance that which is already made penal by state statutes, unless there is express and specific legislative authority for the same, will apply.”

Thrower vs. City of Atlanta, supra.

“According to the repeated adjudications of this court, a municipal corporation can not, in the absence of express legislative authority to do so, enact a valid ordinance for the punishment of an act which constitutes an offense under a penal statute of the state.”

Moran vs. City of Atlanta, supra.

“Relator seeks his discharge because the city has no authority to pass an ordinance covering the same acts denounced by the penal code. We are of the opinion that the position is correct.”

Ex parte Wickson, supra.

“The legislature has empowered municipal corporations of this state to preserve peace and good order therein, but the carrying of weap-

ons, although having a remote tendency to a breach of the peace, is much more objectionable on the ground of its danger to life and limb of the citizens *of the state*. It is probably on that account, more than any other, that it is made a statutory offense in nearly all of the states of the Union * * * *. It would be just as reasonable to say that that power extends to the punishment of petty larceny and arson under the power given to protect the property of citizens."

Judy vs. Lashly, supra.

"The state law fully covers and includes gaming and gaming devices so far as the legislature deems it expedient to legislate upon the subject. The city can, therefore, not legislate on the same subject without express authority."

State vs. Godfrey, supra.

The Supreme Court of Oregon, in a well considered decision, held that the general welfare clause does not authorize a city to enact ordinances enjoining the closing of stores on Sunday, *that act being forbidden by general law*.

City of Cornwallis vs. Carlisle, supra.

Supreme Court of North Carolina held that where gambling was made a crime by general law, a city ordinance covering the same subject is void.

State vs. McCoy, supra.

Supreme Court of Rhode Island has held that an ordinance prohibiting the opening of shops, etc., on Sunday is void, because inconsistent with the Sun-

day laws of the State which prohibit the same thing.

In re Baxter, supra.

“The general welfare clause does not warrant the punishment by the city of an offense which is a crime against the state.

“The power of the municipality to inflict a double or additional punishment to that inflicted by the state must be clearly expressed. It cannot be inferred from a mere general authority to legislate for the good government of the municipality.”

Ex parte vs. Bourgeois, supra.

Under the general welfare clause a city can not by ordinance impose a fine for assault committed within the city, because the general law makes such an act a crime.

Ex parte Smith, Fed. Cas. No. 12, 967-A .

The Supreme Court of California has held, in two careful opinions, that an ordinance of a municipality, covering the same subject as a State law, must be held in conflict with the latter and not authorized.

In re Sic., 14 Pac. 405.

“A by-law of a borough, prohibiting the taking of oysters from the waters within said borough, during a certain period of the year, under a penalty therein prescribed, which the borough is authorized to make by its charter, is abrogated by the general law of the state, passed subsequent to the granting of the charter, prohibiting the doing of the same acts, under

a penalty, prescribed in the latter act, so far as such by-law prohibits such acts, whether such by-law was made before or after the passing of the general law; therefore, no action for the doing of such acts, after the passing of such general law, can be maintained on such by-law."

Syllabus in Southport vs. Ogden, supra.

Supreme Court of Indiana held that, under the general welfare clause, a city may not prohibit the sale of liquor on Sunday, when the legislature has prohibited such sale generally.

Loeb vs. City of Attica, supra.

C.

Enumeration of Special Powers Exclude General Powers.

It will be observed that the law of 1904 expressly enumerates specific subjects upon which the town is authorized to legislate. These are "drunkenness, gambling, and houses or places of ill-fame". All these are fully dealt with by the Penal Code.

Sections 2032, 2007 and 2571, Compiled Laws of Alaska.

When Congress singled out these three subjects over which to bestow concurrent jurisdiction upon the towns, the law will not infer by implication such concurrent jurisdiction over other subjects.

Why enumerate some if the same power was intended to apply to all?

28 Cyc., 274.

IV.

UNREASONABLENESS AND PARTIALITY OF
ORDINANCE.

Assuming the City Council had authority to enact an ordinance denouncing vagrancy, the one here before the court is so unreasonable, partial and oppressive as to be void.

The acts denounced by this ordinance as vagrancy, so far as the charges against appellant are concerned, are two: (a) To be without employment; and (b) to "be found" wandering about the streets after eleven o'clock at night.

The validity of each of these features will be considered separately:

A.

The Crime of Poverty.

In charging appellant with being without "visible means of living or a lawful occupation or employment with which to earn a living", he has not been accused of any moral delinquency, nor with anything which is in itself a public or private nuisance. At most he is charged with being unfortunate. There can be no implied authority to denounce such condition as a crime.

Congress, in denouncing vagrancy, described the offender as an "idle or dissolute person without visible means of support".

Now, "idle" in such connection is defined as: "given to rest and ease; averse to labor or employment; lazy; as, an idle man, an idle fellow". (Webster).

It is evident the town council took the Federal law on vagrancy as a pattern, but eliminates the words "idle" and "dissolute", and thus attempted to render convictions so much the easier by placing all men without employment under the ban of the ordinance whether they were guilty of any moral wrong or not. *Ordinance Amended by Construction.*

The lower court admitted that this definition of vagrancy is not sufficient as an enumeration of the various elements of a crime, but insists that it is the duty of the court to amend it by reading certain words and phrases into it which the town council had deliberately omitted.

The amendment proposed and actually adopted by the lower court and set out in his opinion (Pg. 27) is as follows:

"Whoever is without means of support or lawful occupation or employment by means of which support can be obtained, and who conducts himself in such a manner as to be a detriment to the peace and order, or offend the sense of decency, or shock the morals of the community, is a vagrant."

Having amended the ordinance thusly, it would seem equally necessary to amend the complaint in the same manner. For this amendment enumerates

several additional elements of the offense found neither in the ordinance nor in the complaint.

But no authority can be found to support such extraordinary performances.

Had the code or the ordinance merely denounced vagrancy without at the same time defining what they mean by the term, then it would have been necessary to flounder about in the common law, as did the lower court, in search of the proper interpretation to be applied.

But to seek extraneous sources for that interpretation when the legislative enactments themselves avowedly undertook to and did supply it, is an unreasonable and uncalled for exercise of judicial authority. In fact, for a court to deliberately brush aside the definition given by the legislative power in explanation of its own enactments, and to supply another and different definition, would seem to merit earnest condemnation.

Where the legislature has carefully enumerated the elements which it declares shall constitute the crime denounced, it is not for the courts to add to or take from these elements.

Section 2031 C. L. of A., states what the elements of the crime of vagrancy are for this Territory.

The ordinance does the same for the city.

The learned court below admits that to prove only those acts which are enumerated in the complaint would not be sufficient to convict appellant of any crime. That should end this argument. But

the court insists that under his reformed definition a thousand and one things may be proven which are **not referred** to either in the ordinance or the complaint. That is the vice of this new doctrine.

The defendant is thus admittedly called upon to meet a thousand and one things which have not been charged against him and which have not been referred to as possible elements of the offense, though, had the legislature wished to do so, they might have made them such elements by expressly so declaring.

Nor is the definition supplied by the lower court the common law definition of vagrancy, as the court admits.

The learned court below asserts that the definition of vagrancy used by the town of Juneau is the one employed "time out of mind". That is *literally* true, but during the last hundred years no such definition of the offense has been employed by any legislature that undertook to denounce the crime of vagrancy.

The definition referred to by the court as having been used "time out of mind" originated during the days of Charles II. and the Bloody Circuit. At that time that definition enumerated all the elements of the crime.

It was sufficient in those days, in order to convict a defendant of vagrancy, to simply prove he was without visible means of support. The population was given the option between going to jail as vag-

rants or dividing their resources with the tax-gatherer.

As an authority for the right to augment by construction the acts denounced by a statute and to apply the inhibition to other acts besides those expressly enumerated as constituting the offense penalized, the lower court cites, with much gusto, the decision of the Supreme Court in the Standard Oil cases.

The essential difference in principle between that adjudication and the case at bar is found in the obvious fact that the Sherman Law denounces "monopoly" and "restraint of trade," but does not attempt to define either, or to specify what particular acts shall constitute the offense. The duty to do so was thereby thrown on the courts. In the ordinance here in question the town enumerated the acts which it ordained should constitute vagrancy. That fact not only relieves the court from defining vagrancy, but prohibits it from doing so, and no other acts can be charged as vagrancy besides those so enumerated. That enumeration is exclusive and that definition is binding upon the court.

The lower court's other authorities on this point are no more apposite.

The ordinance will have to be accepted by the courts in the language in which it was enacted. When this is done it becomes evident that the town undertook to denounce acts not only innocent in themselves, but acts which cannot be classed as a nuisance. During the last two years our country

has been swarming with good and virtuous men and women without visible means of support. Dire want has stalked over the country and starvation has hovered about the thresholds of thousands of good homes. Can this court presume that the town of Juneau has been authorized by implication to abate this evil by punishing the unfortunate?

B.

Equal Rights on the Streets.

The ordinance provides that, "all persons having no known occupation or business, who shall be found wandering about the streets of the city of Juneau, after the hour of 11 o'clock at night, shall be deemed vagrants".

There can be no doubt that the town has authority to prescribe reasonable regulations for the use of the streets. Such regulations must be equitable and not arbitrary, and must be fairly designed to meet the needs of relieving congestion and facilitating traffic. If an ordinance had been enacted providing that it should be unlawful to loaf or loiter on the streets in the congested sections of the town during its busiest hours, it would have been a good ordinance, provided the conditions reasonably required such regulations,—and the presumption would be in favor of the reasonableness of such an enactment. But if the ordinance should denounce such loafing and loitering only by a certain class of loafers and

not by all loafers alike, the enactment would be vicious.

The ordinance here in question can not be sustained as a street regulation (1) because it denounces wandering on the street after 11 P. M.—the very hours when the streets are least used and the traffic demands the least regulation; and, (2) because it confines the inhibition to persons having no known occupation or business. It certainly is immaterial to the traffic of the street whether a person wandering thereon has a known occupation or not. Such classification is unjust, unreasonable and uncalled for.

Under this ordinance any person of however good a character, who should choose to wander about the streets at night, unless his occupation or business was known, would be a criminal; but one whose business was known, however reprehensible that business might be, would be a privileged character.

The reasons for the illegality of such ordinance are so clearly stated in the quotations below given that any extended original discussion of the subject is uncalled for:

Mayor vs. Winfield, 8 Humphrey, 707.

Gastineau vs. Commonwealth, 56 S. W., 705

Matter of Frazee, 63 Mich., 396. (6 Am. St. R., 310.)

St. Louis vs. Gloner, 109 S. W., 30.

Taylor vs. City of Sanderville, 44 S. E., 845.

In *Gastineau vs. Commonwealth*, *supra*, there was

a conviction for a violation of the ordinance which provided, "That it shall be unlawful for any woman to go in and out of any building where a saloon is kept * * * * or to frequent, loaf or stand around said building within fifty feet thereof". Upon appeal the court said:

"It is contended for appellee that the sole object of the ordinance is to regulate and control the sale of liquors by reason of the fact that very disreputable, low, common and vile women congregate in and about saloons, thereby causing affrays, fights, murder and other crimes.

* * * * It is insisted for appellant that, in any event, the ordinance is too sweeping in its nature, and subjected any woman who may chance to be wandering around the street and meet a friend, and stop within fifty feet of a saloon, or go into a hotel where liquor is sold, to arrest and punishment.

"It seems to us that the ordinance in question is unreasonable and an unnecessary interference with individual liberty, and tends to subject the vendor of liquor as well as the citizen to unreasonable prosecutions.

"If the ordinance only included persons mentioned in appellee's brief, we are not prepared to say that it would be invalid. But it might be that very good women would, for proper and legal purposes, find it necessary to go into a building where liquor was sold, or stop for a

reasonable time within fifty feet of the same * * * *."

It will be observed that the court in the foregoing decision did not consider itself authorized to amend the ordinance by construction so as to make it reasonable and otherwise legal.

Matter of Frazee *supra.*, was a decision by the Supreme Court of Michigan, in which Chief Justice Campbell wrote a clear-cut and lucid opinion, holding the ordinance void upon habeas corpus proceeding after conviction of petitioner in a lower court.

The first section of the ordinance claimed to have been violated provided:

"No person or persons, association or organization, shall march, parade, ride, or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city; funeral and military processions, however, shall not be subjected to the foregoing provisions of this section * * * *."

The lower court asserts that this ordinance was held void solely upon the ground that it left the arbitrary power with the mayor to grant permits.

From the quotations which follow it is obvious the court has misread this decision. The Supreme Court *inter alias* said:

“Section 1, as has been seen, while imposing no limits on military and funeral processions, except that it authorizes the mayor or chief of police to confine them to particular streets, gives to those officers unlimited discretion to fix their route. Other processions can not move at all, with music and banners, unless authorized by the mayor or council, and when so authorized, are under the same arbitrary direction, as to route, of the mayor or chief. Funeral processions, and no others, are protected from disturbance.

“If the legislature of the state had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and, having such power, had clearly signified their purpose to do so, then it might perhaps be claimed, with some show of reason, that the City of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers.

“All charters, and all laws and regulations, to be valid for any purpose, must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws of the land, and

any by-law which violates any of the recognized principles of legal and equitable rights is necessarily void, so far as it does so, and void entirely if it cannot be reasonably applied *according to its terms*.

“It is quite possible that some things have a greater tendency to produce danger and disorder in the cities, than in smaller towns, or in rural places. This may justify reasonable precautionary measures but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. *That which is an actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of its wrongfulness.*

“There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards. And to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power.

“It has been customary, from time immemorial, in all free countries and in most civilized countries, for people who are assembled for common purposes to parade together, by day or at reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious, and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims, and valuable factors in furthering them * * * *. It is only when political, religious, social, or other demonstrations create public disturbances or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes. And when it interferes, it does so because of the evil done or apparently menaced, and not because of the sentiments or purposes of the movement, if not otherwise unlawful; and things absolutely unlawful are not made so by local authority, but by general law * * * *. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result. It is not competent to make any excep-

tions, either for or against the body of which petitioner is a member, because of its theories concerning practical work. In law it has the same right, and subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar means for drawing attention or creating interest.

“Whatever regulation is made must operate uniformly under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequences. That is already provided for under the law of nuisances. These processions might, no doubt, become nuisances, as any others might do so, but it can not be assumed that they will.”

This decision establishes three propositions of law :

(1) That the city council has no authority to deny any citizen an equal right on the streets, with all other citizens.

(2) Nor to prohibit the use of the streets in any manner that does not in and of itself amount to a nuisance.

(3) Nor to delegate to any official arbitrary power to grant or withhold permit for using public streets.

In *City of St. Louis vs. Cloner, supra.*, defendant was charged with violating an ordinance declaring it unlawful for “any person or persons to lounge,

stand or loaf around or about or at street corners, or other public places in the day or night time."

The court held this feature of the ordinance void, and in doing so said:

"While the city of St. Louis is given power by the second clause of Section 26, Art. 3, of its charter (Ann. St. 1906, p. 4809) to regulate the use of its streets, *the question here presented is as to whether it had the right, under the provisions of its charter, to pass the ordinance upon which this prosecution is based, and which makes it a misdemaenor, punishable by fine, for any person to lounge, stand, or loaf around or about or at street corners or other public places, in the day or night time.* There is no pretense that defendant was at the time of his arrest in any way obseructing the street, or interfering with the rights of any other person, or conducting himself in a disorderly manner; the only charge against him being that he violated said ordinance on the 4th day of August, 1904, and on divers other days and times prior thereto, by unlawfully lounging, standing, and loafing around and about and at certain public street corners and other public places, to-wit, Eleventh street and Washington avenue, in the day and night time. While the city has the undoubted right, under its charter, to regulate the use of its streets, it has no right to do so in a way that interferes with the personal liberty of a citizen

as guaranteed to him by our constitution and laws. Under this ordinance it is just as much an offense to stand or loaf around upon the corner of one of the streets in the city for five minutes as for two hours or more, time not being an ingredient of the offense; and this, too, regardless of the fact that the offender may not during that time impede the passage of other pedestrians or otherwise interfere with the rights of others. The defendant had the unquestioned right to go where he pleased, and to stop and remain upon the corner of any street that he might desire, so long as he conducted himself in a decent and orderly manner, disturbing no one, nor interfering with any one's right to the use of the street.

"Is the ordinance in question, then, restrictive of or in violation of the right of personal liberty guaranteed to every citizen by Section 4, Article 2, of the Constitution (Ann. St. 1906 p. 128) of this state?

"In *City of St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915, a city ordinance making it an offense for anyone to knowingly associate with persons having the reputation of being thieves, gamblers, etc., for the purpose of aiding and abetting such persons in their unlawful acts, was held invalid, because an invasion of personal liberty. That case was followed in ex

parte Smith, 135 Mo., 223, 36 S. W., 628, 33 L. R. A., 606, 58 Am. St. Rep., 576.

“In the case of *Pinkerton v. Verberg*, 78 Mich., 573, 44 N. W., 579, 7 L. R. A., 507, 18 Am. St. Rep., 473, it is said:

“ ‘Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion, to go where one pleases, and when, and to do that which may lead to one’s business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which exist-

ed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land.' ”

It is evident, the opinion of the lower court to the contrary notwithstanding, that this case was decided upon the question of the validity of that portion of the ordinance above quoted, and that, if the case had been before the court solely upon a judgment in *habeas corpus* proceedings under that feature of the ordinance, a reversal would have resulted upon the theory that the ordinance was void upon its face.

Taylor vs. City of Sanderville, *supra.*, has been relied upon by the appellee, but, it is believed, without reason. That case was decided on a writ of *certiorari*. The petition and answer showed that petitioner was convicted of violating a municipal ordinance making it penal “to be found idling, loitering or loafing on the street”.

There is nothing in the records of the case to show that the ordinance in the lower court was attacked as unreasonable, oppressive, and unconstitutional. The court upheld the ordinance as a valid street regulation, because it applied to all classes of citizens alike and therefore was not in conflict with the vagrancy statute of the State. It said:

“The ordinance is not aimed at the lazy and shiftless, who are apt to require support in some public institution, or else to resort to theft; but to all persons, rich or poor, who loiter and loaf

on the public streets * * * * and who, at best, render more difficult the passage of others along the street."

Among ordinances held void as partial, unreasonable, and oppressive, the following may be cited:

Requiring the police to arrest all free negroes found on the street after ten o'clock at night.

Mayor vs. Winfield, 8 Humphrey, 707.

Forbidding sale of goods by store-keepers on Sunday, and exempting Jews from its operations.

Shreveport vs. Levy, 21 Am. R., 553.

Prohibiting one person from carrying on dangerous business, and permitting another to do so.

Mayor vs. Thorne, 7 Paige, 261.

Compelling persons to destroy or remove property not shown to be a nuisance.

Pieri vs. Mayor, 42 Miss., 493.

Prohibiting licensed retailers of spirituous liquors from selling it between 6:00 P. M. and 6:00 A. M.

Ward vs. Greenville, 8 Baxter, 228.

Compelling the removal from the city of a steam engine which is not, in itself, a nuisance.

Baltimore vs. Radecke, 49 Md., 217.

Prohibiting sale, without license, at temporary stands, in the public streets, of lemonade, ice cream, etc.

Burling vs. West, 29 Wis., 307.

Requiring a druggist, under heavy penalty, to furnish quarterly statement, verified by affidavit, of kind and quantity of spirituous liquors sold.

Clinton vs. Phillips, 58 Ill., 102.

Imposing a fee of five cents on every sale of hay or produce.

Keep vs. Patterson, 2 Dutch., 298.

Prohibiting producers from vending vegetables upon the public streets without first procuring license, at an annual expense of \$25.00.

St. Paul vs. Traeger, 25 Minn., 248.

Refusing to supply water to premises, upon application of owner, on the ground that the tenant was in arrears for water furnished him while occupying premises of another landlord.

Dayton vs. Quigley, 29 N. J. Eq., 77.

Excluding applicant from entering High School, who had passed a satisfactory examination in every study except grammar, it appearing that the parent did not desire that his child should pursue that study.

Trustee vs. People, 87 Ill., 303.

Expelling a child from school for declining, under direction of her parents, to study book-keeping.

Rulison vs. Post, 79 Ill., 567.

See generally on this subject:

28 Cyc., 368.

FUNDAMENTAL ERRORS OF LOWER COURT.

The lower court, as the foundation stone of its argument, announces this astonishing rule:

“All doubt must be resolved in favor of the validity of the ordinance. The burden is upon the one who asserts its invalidity to demonstrate it.”

In answer the following authorities are respectfully submitted:

“Where a city ordinance is claimed to interfere with common law rights, the burden is upon the city to show that it has not exceeded its powers in passing such an ordinance.”

City of St. Paul vs. Laidler, 72 Am. Dec., 189.

“If there is a *fair reasonable doubt* concerning the existence of the power in the charter of the city, it will be resolved against the city, and the exercise of the power denied.”

(1899) *Thomas vs. City of Grand Junction*,
56 Pac., 665;

(1903) *State vs. Butler*, 77 S. W., 560;

(1901) *Meday vs Borough of Rutherford*, 48
A., 529.

“Municipal corporations possess only such powers as are granted by the legislature in express words, and those necessarily implied or incidental to those expressly granted, and those

necessary to the declared object and purpose of the corporation to its continued existence; and doubtful claims to power, or ambiguity in the legislative grant thereof are to be resolved against the corporation."

(1898) *Los Angeles City Water co., vs. City of Los Angeles*, 88 Fed., 720 (729);

(1905) *City of Elkhart vs. Lipschitz*, 74 N. E., 528;

(1882) *Kirkham vs. Russell*, 76 Va., 956.

"A statute conferring power upon a municipality will be presumed to have been framed with reference to the rule that nothing is to be taken by intentment in construing legislative grant of power."

Detroit Citizens Street Ry. Co., vs. City of Detroit, 68 N. W., 304; 171 U. S., 48 (54).

"Doubtful claims to power or any doubt or ambiguity in the terms used by the legislature in conferring powers on municipal corporations are to be resolved against the corporation."

(1896) *Pittsburg, etc., Ry. Co. vs. Town of Crown Point*, 45 N. E., 587.

The lower court in further justification of its position dilated with seductive power and eloquence upon the need of such an ordinance as the one here in question for a seaport town like Juneau. The

Court's enthusiasm has carried it off its feet and into regions of aerial fancy.

Judicial notice will be taken of the fact that the census for 1900 shows that the population of Juneau that year was 2000 and that the census for 1910 shows this number to have declined to 1,600 souls. During this period of retrogration (1903) the ordinance in question was enacted.

The court takes judicial notice of the further fact that our only export during those years was a few pounds of gold from Treadwell, credited to this port, while our imports consisted of sufficient to feed this population.

The Customs House records further show that steamers calling at this port, on their route between the southern ports and Skagway, would average only about three per week throughout the year.

Since then there may have been some changes, but if the ordinance was void when enacted no change in conditions subsequently would validate it.

But what are these changes? At last city election, where both men and women, citizens and non-citizens, had a right to vote, the number exercising the elective franchise was only about 1,000. This would show at the present time a population of less than 4,000, based upon the ordinary methods of calculation.

These conditions would not be worthy of notice except for that straining for excuses which we think

characterizes the opinion of the lower court. So much was that learned tribunal distracted by its own enthusiasm that it lost sight of the main questions in the case.

Respectfully submitted,

JOHN RUSTGARD,

Attorney for Appellant.

No. 2592

United States
Circuit Court of Appeals
For the Ninth Circuit

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer
of the town of Juneau, Alaska,

Appellee

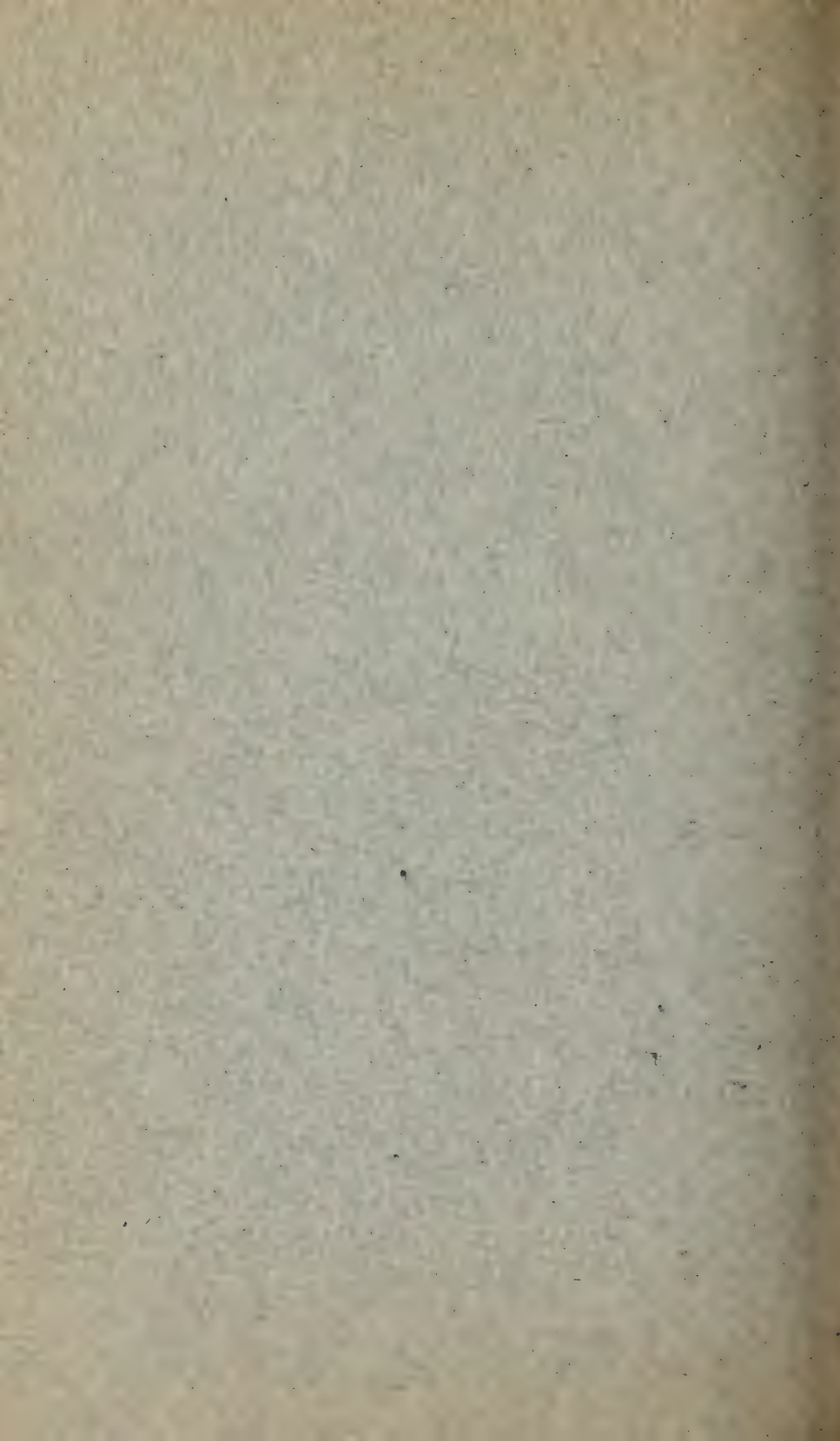
Brief for Appellee

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1

J. A. HELLENTHAL &
SIMON HELLENTHAL,

Filed Attorneys for Appellee

OCT 23 1915



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Attorneys for Appellee

STATEMENT OF THE CASE

This is an appeal from an order made by the District Court for the First Division of the District of Alaska, at Juneau, in which the court refuses to release the appellant upon a Writ of Habeas Corpus. The appellant had been tried and convicted for violating an ordinance of the town of Juneau by the municipal magistrate of said town after a hearing had. The appellee contends that said conviction was in all respects lawful:

1. That the Magistrate's court is legally organized and existing.
2. That the Town of Juneau was empowered and authorized to enact ordinance in question.
3. That the jurisdiction of the magistrate's court over misdemeanors made so by ordinance is concurrent with jurisdiction District court and Commissioner's court in cases also covered by general laws.
4. That the ordinance is a reasonable police regulation considering the conditions prevailing in the Town of Juneau.

ARGUMENT

1. MAGISTRATE'S COURT LEGALLY ORGANIZED AND EXISTING.

The magistrate's court of the city of Juneau derives its authority and jurisdiction from acts of Congress passed March 3, 1899, 30 Stat. L. 1253; June 6, 1900, 31 Stat. L. 1438; March 3, 1901, 11 Supplemental R. S., Chap. 859, page 1806; March 2, 1903, 32 Stat. L., Chap. 978, page 944; April 28, 1904, 33 Stat. L., Chap. 1778, page 529. To better understand the force and effect of this legislation we will briefly refer to the procedure under which misdemeanors were prosecuted prior to their enactment. Prior to March 3, 1899, the general laws of Oregon, as they were in force and effect in that state, were adopted as the laws of Alaska as far as they were applicable, Act of May 17, 1884, Section 7, R. S., 1 Supple., Chap. 53, page 430, also in 23 L. S. 24. The laws of Oregon at the time they were adopted by Alaska contained a criminal code and a code of criminal procedure under which misdemeanors were tried, but did not refer to the procedure to be followed in the municipal courts, as cities were incorporated in Oregon, and given their powers by special acts of congress.

The act of March 3, 1899, was a compilation of the laws of Oregon as far as they pertained to crimes and criminal procedure. The enacting clause of which reads: "Be it enacted that the penal and criminal laws of the United States of America and the procedure thereunder relating to the district of Alaska shall be as follows": This act defines crimes, provides the punishment therefor and provides for a code of criminal procedure under which felonies and misdemeanors are to be tried in the District of Alaska and gives the District courts, and Justice courts with some limitations, jurisdiction to try misdemeanors.

By the Act of June 6, 1900, the civil laws of the state of Oregon and some parts of the civil laws of the state of Montana and the civil procedure of the state of Oregon with slight modification were adopted and made the civil code and the code of civil procedure for the District of Alaska, which enactment is referred to as the Alaska Civil Code and Code of Civil Procedure. Part of this act, chapter 21, provides for the incorporation of towns, the election of a common council. Section 201 gives the town council certain general powers, among which are the right to appoint and the pleasure to remove clerk, treasurer, and assessor and such other officers as they may deem necessary and by ordinance to provide for protection of the public health, police protection, and the expense of assessment and collection of taxes. It does not expressly refer to or establish a municipal court, nor does it expressly provide for the election or ap-

pointment of a municipal magistrate. This chapter however was amended on March 3, 1901, which amendment refers to the duties of the treasurer, the matter of the expending and proportioning the license money, and was again amended by the Act of March 2, 1903, Section 5 of which act provides that the common council may by ordinance declare what shall be a misdemeanor, provide for ———, ———, protection of public health, police protection, etc. Section 11 provides that the common council may by ordinance provide reasonable punishment for the violation of municipal ordinances. Section 12 provides for the election of a municipal magistrate, who shall have power to hear and determine causes arising under the ordinances of such corporation and to punish violations of all such ordinances. It does not provide a procedure under which the magistrate court should proceed in the trial of misdemeanors, but we contend that such provision would be entirely superfluous since congress had previously enacted a code of procedure under which all misdemeanors were to be tried in the District of Alaska.

The city of Juneau was incorporated under the law of June 6, 1900, and established a municipal court on the 10th day of July, 1903, and on April 28, 1904, congress again amended Chapter 21, which act purports to amend and codify the laws relating to municipal corporations in the District of Alaska and repeals all acts and parts of acts inconsistent therewith to the extent of such inconsistency. This act, as far

as it relates to the municipal magistrate, makes him an appointive officer instead of an elective officer, Section 4, Second Sub. Section, and provides that a municipal magistrate shall have jurisdiction of all actions for violation of municipal ordinances, Section 4, Tenth Sub. Section, and we contend that the latter act does not in any way curtail or affect the powers of the municipal magistrate as previously given him, but substantially re-enacts those powers. By the Act of 1903, the common councils were empowered to define misdemeanors and to provide for police protection.

By the act of 1904, in Section 4, Sub. 6, thereof they are again empowered to provide for police protection and by the 10th sub-section to prohibit drunkenness, gambling houses or places of ill fame, disorderly conduct, or conduct endangering the public peace, public health and public safety, to define such offenses and to prescribe the punishment thereof.

We contend that the powers given by the Act of 1903 to declare what shall be a misdemeanor and to provide for police protection are as broad as the powers given by the Act of 1904, in which the council is authorized to punish disorderly conduct, conduct endangering the public peace, public health or public safety and to define such offenses. And further contend that the common council had the power to enact the ordinance in question, being Ordinance No. 27, passed and approved July 27, 1903, under the law

passed March 2, 1903, and that the Act of 1904 did not in any way invalidate said ordinance as the powers of the common council as far as they relate to police regulations are similar in the two acts.

The Colorado case cited by appellant is not applicable since there were many constitutional restrictions in the state of Colorado which prevent courts being organized unless certain specific rights were conferred which were not conferred by Section 2714 of the general laws of Colorado, which provide for the election of a police judge and stopped there. They, however, tried to bring it under a previous act, Section 9 of Act of February 18, 1874, but said act provided that a justice of the peace might be elected as municipal magistrate, thus limiting the eligible candidates to justices of the peace, and since the officer in the case was not a justice of the peace he could not possibly hold under said act. We contend that at the time the acts of congress were passed authorizing the organization of the municipal courts by municipal corporations in Alaska there was a well established procedure in the District of Alaska under which misdemeanors were tried and that the acts of congress passed are amply sufficient to authorize the organization of municipal courts thereunder.

We further contend that it is not absolutely essential to the validity of the organization and jurisdiction of a municipal court that a code of procedure should be laid down by the legislature, and that in the absence of such procedure the municipal council

can enact a code of procedure in harmony with the laws of the state or territory and in accord with the spirit of our institutions, and that a conviction had under a procedure so established would not be disturbed upon a proceeding in habeas corpus, unless the procedure was shown to be in conflict with the laws of the state or territory, or in contravention of the spirit of our institutions. *Ex. parte Mauch*, 66 *Pac.* 734.

2. THE TOWN OF JUNEAU WAS EMPOWERED AND AUTHORIZED TO ENACT ORDIN- ANCE IN QUESTION.

We have already set up the acts and powers given municipal corporations in Alaska by the legislature, and contend that the city of Juneau was authorized to enact said ordinance under the law of 1903 and that the law of 1904 did not change or modify the powers of the common council, as far as the ordinance under consideration is concerned; that the police powers given municipal corporations by the two acts are the same and for this reason we do not think it is important to consider whether the Act of 1904 repealed the Act of 1903 in regard to the police powers conferred. We, however, contend that it did not repeal the provisions of the former act that are not inconsistent with the latter act, and that the Act of 1904 repealed only inconsistent parts of the Act of 1903. The authorities cited by appellant are to the

effect that the intention of the legislature should govern; the heading of the act, which purports to amend and codify, would seem to indicate that the legislature meant to cover the whole subject of municipal corporations by the act, but the act itself clearly shows the intention of the legislature, and repeals only such parts of prior acts as are inconsistent therewith.

3. JURISDICTION MAGISTRATE COURT MISDEMEANORS CONCURRENT WITH JURISDICTION DISTRICT COURT AND COMMISSIONER'S COURT.

We contend that the jurisdiction of the magistrate's court in Alaska over misdemeanors made such by ordinance of the municipality to prohibit drunkenness, gambling houses or places of ill fame, disorderly conduct or conduct endangering the public peace, public health or public safety, is concurrent with the jurisdiction of the district courts and commissioners' courts, if the acts upon which a conviction is sought also constitute a misdemeanor under the general laws of the Territory, and if not covered by general laws, then the jurisdiction of municipal court is exclusive, and contend that the enactment of Section 2 of Ordinance 27 of the city of Juneau comes within the powers expressly granted by the 10th sub-division of Section 4 of the Act of 1904, which gives the common councils express power to prohibit drunkenness,

gambling houses or places of ill fame, disorderly conduct or conduct endangering the public peace, public health or public safety, and to define such offenses.

We are at a loss to say what congress would mean by "disorderly conduct or conduct endangering the public peace or safety" if it did not mean precisely the matters covered by said ordinance. It is true that according to said ordinance the people therein enumerated are to be deemed vagrants, but the matters specified in said ordinance also constitute disorderly conduct, conduct endangering the public peace and public safety. If the matters and facts therein prohibited are disorderly acts, or acts endangering the public peace and public safety then congress gave municipal corporations in Alaska the power to prohibit such acts by ordinance, regardless of whether the same acts also constitute a violation of the general laws of the Territory. In this connection it is important to consider the character of the acts prohibited, whether they are to be regarded as an offense against the state or territory primarily or whether they are to be regarded as an offense particularly against the municipality. In considering the concurrent jurisdiction of municipalities and state, not only the express powers granted the municipality become important, but the character of the offense is of great importance. Drunkenness has been held to be an offense particularly against the municipality, which affects especially the morals of the local community, and ordinances de-

nouncing it have been sustained under a general grant of power although the same acts constitute an offense against the state by statute. *McRae vs. Americas*, 59 Ga., 168-170; *Blumfield vs. Trimble*, 54 Iowa, 399, 6 N. W. 586. In the *McRae* case, while upholding an ordinance prohibiting drunkenness under a general grant of power in a state where drunkenness was an offense against the state, the court says: "Municipal government stands between the family and the state. It is an aid to both and partakes of the nature of both. Police ordinances are at once family rules on a large scale and state laws on a small scale. * * * * Many transactions that are made penal by the general laws of the state, may, at the same time, afford material for a proper police ordinance. The state may deal only with the central elements of a transaction which is fringed all around with adjuncts that ought to be prohibited by ordinance as highly mischevious to the quiet of municipal society." Likewise the keeping of a house of ill fame has been characterized as an offense particularly municipal, *Greenwood vs. State*, 6 Baxter (65 Tenn.) 567, and the same acts may be made an offense against the state and an offense against the municipal corporation; that an act made penal under the statutes of the state or territory may be further penalized under municipal ordinance.

The cases in regard to the power necessary in order to impose such additional penalties are somewhat in conflict, but the later decisions consider not only the

direct power granted, but give great consideration to the matters covered by the ordinance, if the matters are peculiarly municipal and affect especially the morals of the local community. The best considered cases and especially the more recent ones have not hesitated to uphold the municipal ordinance in regard to police regulations under general grant of power. See Vol 3, *McQuillin on Municipal Corporations*, Chap. 25, and particularly Sec. 941 and Sec. 975; *Taylor vs Sanderson*, 118 Ga., 63; 43 S. E. 845.

Double regulations have been sustained in a majority of the states, including Oregon; *Wong vs Astoria*, 13 Ore., 538; 11 Pac., 295; *State vs. Sly*, 4 Ore., 277; *State vs. Bergman*, 6 Ore., 341; and by the courts of the United States, *Moore vs. Illinois*, 14 Howard 13; *Cross vs. North Carolina*, 132 U. S., 131; 10 Sup. C., 47. There are many acts constituting offenses which may be made offenses against the municipality although they are governed by state or territorial laws and among them are the conducting of houses of ill fame, lewd women on the streets, public drunkenness, gambling, disturbing the peace, nuisances, careless driving and vagrancy, which has been held to be such an offense in *St. Louis vs. Bents*, 11 Mo. 61; *Kansas City vs. Neil*, 49 Mo. App., 72-78. In *St. Louis vs. Bents*, John Bents was proceeded against before the recorder of the City of St. Louis under the provisions of an ordinance of the city entitled "an ordinance respecting vagrancy." Upon the trial he was found guilty and fined \$75.00, from

where he appealed to the criminal court and there moved to dismiss the proceeding and quash the charge against him for the reason that the city ordinance under which he was convicted was void, the city having no power by its charter to pass such ordinance. His motion was sustained by the criminal court and the city accepted and appealed. The court in deciding the case says:

“By the 38th subdivision of the 2nd section of the 3rd article of the charter of the city of St. Louis, the city council are vested with power ‘to regulate the police of the city.’ Although this is a very vague and indefinite grant of power, yet it must have been intended to confer other powers than those specifically granted, otherwise there existed no propriety in the enactment. When, therefore, it can be seen that the exercise of any jurisdiction by the corporation can be clearly brought within the scope of this grant without a violation of the constitution or a conflict with the laws of the state, there can be no objection to its exercise. We think this case is one of that character * * * * It is true, that by the general law of the state, an individual found to be a vagrant under the provisions of the statute, may be proceeded against before a justice of the peace, but this does not forbid the corporation making a local regulation on the same subject—a subject affecting the well-being and prosperity of the community to as great an

extent as almost any other within the control of the corporation. The judgment of the criminal court is therefore reversed, and the cause remanded."

4. THAT THE ORDINANCE IS A REASONABLE POLICE REGULATION.

In considering the reasonableness of this ordinance it is important to look at the wording of the ordinance having in mind the meaning given these words from time out of mind, as well as the conditions existing in the city of Juneau sought to be remedied, which matters are fully covered by the opinion of the lower court in this cause. If we are right in our contention that the common council had express power to pass the ordinance in question the reasonableness of the ordinance will not be questioned by the courts. *McQuillan on Municipal Corporations, Sec. 724, and cases cited.* Some cases hold that the power of a court to declare an ordinance unreasonable and therefore void is restricted to cases in which the legislature has given no express power on the subject of the ordinance and consequently to cases in which the ordinance was passed under the supposed incidental powers and does not extend to a case where there is either specific or general power to enact the ordinance. *Coal Fleet vs. Jeffersonville* 112 Ind., 15 and 19; 13 N. E., 115. The reasonableness of ordinances is not to be tested by its application to extreme cases. *Com-*

monwealth vs. Palstied 148 Mass., 375; 382; 19 N. E. 224; *Commonwealth vs. Cutter*, 156 Mass., 52, 56; 29 N. E., 1146.

Further, that an ordinance, general in scope, may be adjudged reasonable and valid as applied to one set of facts and unreasonable and invalid as applied to facts of different character. Thus there is a distinction between an attack made upon an ordinance by way of appeal and in habeas corpus proceedings, as an ordinance must be reasonable as applied to the particular subject matter, *Willow Springs vs. Wit-houpt*, 61 Mo. App., 275; *People vs. Armstrong*, 73 Mich., 288; 41 N. W., 275. And that judicial authority to declare an ordinance unreasonable is a power to be cautiously exercised. *Commonwealth vs. Robertson*, 5 Cushing, Mass., 438. The general rule is that municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of their ordinances and that there is a legal presumption in their favor; that in questions of doubt the courts are inclined to refer to the discretion and judgment of the municipal authorities. Courts hold: "When municipal authorities have adopted an ordinance, before a court is justified in holding the same to be invalid the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property must be clearly made to appear. It should be manifest that the discretion interposed by the municipal authorities has been abused." *McQuillan on Municipal Corporations*, Sec.

731, and cases cited, and also later cases, which hold that an ordinance regularly passed under the police powers of the municipality, will be presumed to be reasonable and the conditions warranting the passage of said ordinance will be presumed to exist unless the contrary is shown.

Wells vs. Town of Mt. Olivet, 102 S. W., 1182;
Miller vs. City of Birmingham, 44 So. 388;
Jersey City Railway Company vs. Jersey City,
 67 Atl., 1072;

City of Seattle vs. Hurst, 97 Pac., 454;
Cincinnati vs. Burkhardt, 30 Ohio Cir. Ct. R.,
 350;

Harter vs. Barkley, 112 Pac., 556;
St. Louis Gunning Advertising Co., vs. City,
 137 S. W., 929;

Ex parte Savage, 141 S. W., 244;
Commonwealth vs. Price, 94 S. W., 32;
Mayor of Taladega vs. Fitzpatrick, 32 So.,
 252;

Lawson vs. Connally, 141 N. W., 625;
Chicago vs. Mandel Brothers, 106 N. E., 180;
City of Brenhan vs. Holle & Sulhurst, 153 S.
 W., 345;

Rochester vs. McCaulay F. M. Co., 92 N. E.,
 641, and

Dillon on Municipal Corporations, 5th Edition, paragraph 599.

In *Harter vs. Barkley*, cited above, the court adopts

the language of *Re Zhizhuzza*, 147 Cal., 334; 81 Pac. 955, and says:

“ ‘A municipal ordinance must be very clearly obnoxious to such objection before it will be declared invalid. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizens by the constitution, or laws made in pursuance thereof.’ *Ex parte Haskell*, 112 Cal., 416, 44 Pac., 725; *Ex Parte McKenna*, 126 Cal., 432, 58 Pac., 916; *Ex Parte Lemon*, 143 Cal., 563, 77 Pac. 455.’ In the majority opinion in that case, signed by six of the justices, the following language is adopted with approval from the case of *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed., 29, 61 C. C. A., 91: “Laws or ordinances enacted under the police power for the protection of the public health, reasonably adapted to that end, are not unconstitutional, because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with

their personal liberty, nor because they may give one person a monopoly of a certain business or occupation; private rights being required to yield in such case to the public good."

In *Mayor of Talladega vs. Fitzpatrick, super*, it is held that the enactment of an ordinance by the common council is prima facie evidence of its reasonableness and the fact that the offense is defined the same under the general law with the exception that the word "wilful" is not contained in the ordinance does not in any way invalidate the same for the reason that in construing the ordinance the courts will not convict unless it is shown that the act was done wilfully.

In *Lawson vs. Connally, super*, the court says: "Courts cannot interfere with legislative discretion and are slow to declare ordinances invalid because unreasonable. When the power to legislate upon the subject has been conferred upon the common council, the council's discretion and not the court's must control, in such matters the city authorities are usually better judges than the courts."

In the case of *Jersey City Street Railroad Company vs. City of Jersey, super*, in regard to the presumption of the reasonableness of ordinances, the court says: "The sole contention is that the ordinance is unreasonable because it is impossible to comply with it. It being conceded that its subject matter is within the police power of the municipality and that the board of street and water commissioners is the proper leg-

islative body to exercise that power, the presumption is (until the contrary be shown) that the ordinance is reasonable. The question of reasonableness is a question of fact and the burden of proof is upon those who attack the ordinance to show its unreasonableness. The courts will not interfere unless it is clearly shown that the ordinance, either upon the face of its provisions or by reason of its operation in the circumstances under which it is to effect, is unreasonable and oppressive."

In *City of Seattle vs. Hurst, super*, the court say:

"An ordinance to be void for unreasonableness must be plainly and clearly unreasonable, there must be evidence of weight that it took inception either in the mistake or in a spirit of fraud or wantonness on the part of the enacting body."

Commonwealth vs. Price, super, is a case decided by the Court of Appeals for the State of Kentucky, and involves the construction of an ordinance of the city of Madisonville, and was decided after the case of *Gastenaus vs. Commonwealth*, 108 Ky., 473, 56 S. W., 705, which case is cited by the appellant and depended upon to a large extent for a reversal here. In regard to the reasonableness of the ordinance, the court say: "The city council has a large discretion in the enactment of ordinances and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive and unreasonable." The ordinance construed in the above cited case was an amendment or an ordinance similar to the one con-

strued in the Gastenau case, except that the ordinance under consideration makes it an offense for the saloon keeper to suffer an infant or female to drink in his saloon, or to be or remain there over five minutes, and provides that when these facts are shown, the prosecution has made out its case and the burden then shifts to the defendant to show that he is an infant or female in good repute and was at the time sober and orderly and had the consent of the parent or guardian of the infant or husband of the female, or, that it was a case of reasonable necessity. The court say: "It is a well known fact that the frequenting of saloons by lewd women tends to immorality and that the frequenting of saloons by infants is not promotive of good citizenship."

Apply this rule of construction to the case at bar in which there was no evidence taken tending to show the unreasonableness of the ordinance, the District Court has found the conditions prevailing in the city of Juneau, as shown by the opinion herein, and has found in favor of the ordinance. The municipal council being the primary judges as to the reasonableness of an ordinance and the burden being placed upon the person attacking an ordinance to show that it is unreasonable, nothing having been offered to show the unreasonableness of the ordinance, we contend that the ordinance should not be held unreasonable.

The appellant in his brief lays great stress upon the Michigan case, *In the Matter of Frazee*, 63 Mich.,

369, which arose in the city of Grand Rapids and was a conviction under an ordinance regulating street parades in said city and provided that it should be unlawful to parade the streets without first obtaining the consent of the mayor, which consent under the ordinance could be arbitrarily exercised by the mayor and the granting or refusing of which depended upon the mayor's unregulated official discretion, and the chief objection against the ordinance and at least the main reason for the decision of the court in the Frazee case was that it gave arbitrary powers to the mayor of the city. This case was followed by Pinkerton vs. Verberg, 78 Mich., 573, which case involved an unlawful arrest made in the city of Kalamazoo, the facts of which are not applicable to the case at bar. The reason laid down in this Michigan case, Pinkerton vs. Verberg, seems to have been adopted by the court in St. Louis vs. Glover, 109 S. W., 30, which case was an appeal from a decision of a lower court under an ordinance somewhat similar to the one in the case at bar, in which the facts showed that the appellant was engaged in peaceful picketing at the time of the arrest. We submit that the Michigan cases, as well as the case based upon the decision in the Michigan cases, lose much of their force and effect since the later decision of the Michigan court *In re Stegenga*, 94 N. W., 384, which was an appeal from the refusal to grant a Writ of Habeas Corpus to the petitioner who was accused and convicted of having been found loitering about in common bar

rooms and wandering about the streets by day and by night without any lawful means of support and without being able to give a satisfactory account of himself in the city of Grand Rapids, for a period of two weeks, under an ordinance which made it unlawful for persons to loiter about any hotel, block, common bar room, dram shop, gambling house or disorderly house, or wander about the streets either by night or day without any lawful means of support and without being able to give a satisfactory account of himself or herself, in which case it was contended that the ordinance was void, first because of lack of authority of the city council and second because it was unreasonable and that it interfered with the constitutional rights of personal liberty. The court, after reviewing the prior Michigan cases, including the case of *Pinkerton vs. Verberg* and *In re Frazee*, says:

“But it is not certain that this man was not a disorderly person, punishable at common law. For two weeks he loitered about the streets and barrooms, in idleness, without apparent habitation, and without any means of support, according to the charge. Yet he lived, and the inference is not unreasonable that he was supported in idleness by others in some way. He loitered about barrooms, (i. e., tippling places), and gave no satisfactory explanation of his conduct. Blackstone says (4 Bl. Com., 169) that all idle persons are punishable, while the statute, 17

Geo. 11, e., 5, provided that idlers and disorderly persons, rogues, and vagabonds, and incorrigible rogues should be punishable; idlers and disorderly persons by a month's imprisonment, and the other classes by more severe penalties. And, if it be said that this statute is no part of our common law, idle persons were punishable under ancient statutes, which in their turn merely declared the common law in that respect. See 4 Bl. Com., 169. The uniformity of the practice of authorizing and passing and enforcing ordinances for the punishment of mendicants, idlers, and vagabonds is a circumstance that indicates the general recognition that such persons may be treated as lawbreakers, and punished in accordance with the general law of the land.

"But little need be said on the other branch of the case, for the foregoing discussion shows that it is not an invasion of constitutional right to punish conduct in fact disorderly, and dangerous to and destructive of good order.

"It does not follow that this ordinance would justify the conviction of all arrested under it, or that each of its provisions, standing by itself, would constitute an offense. We do not say that they would, or would not. In this case, however, we are satisfied that the acts charged, and of which, the petitioner was convicted, constitute an offense under this ordinance, and the petition will be dismissed, and the petitioner remanded

to the custody of the respondent. The other justices concurred."

The appellant cites numerous cases under the heading, "Fundamental Errors of the Lower Court," and contends that the court erred in laying down the rule previously discussed, that *prima facie* a police ordinance regularly enacted is reasonable and that courts will not find the same unreasonable unless its unreasonableness is made to appear. And wish here to call attention to the difference between police regulations regularly enacted for the purpose of regulating matters that are purely municipal and under the police power, or ordinances which involve bond issues and the construction to be placed upon a bond given by the city thereon as in the case of *Thomas vs. City of Grand Junction*, 56 Pac., 665; or an ordinance involving the power of the city to contract and the construction of its contract made, *State vs. Butler*, 77 S. W., 560; or in the case of an ordinance under which a tax deed was issued by the city, in which it was held that the authority given to issue a tax deed did not give implied power to warrant, *Meday vs. Borough of Rutherford*, 48 A., 529; or an ordinance which regulates water rates and impairs the obligation of a contract as in *Los Angeles Water Company vs. City of Los Angeles*, 88 Fed., 720; or ordinances under which the city attempts to regulate under its police powers a business carried on beyond the corporate limits of the city, *City of Elkhart vs. Lipschitz*, 74 N. W., 528; or the cases involving the construction

of an election ordinance and the right of certain applicants for a writ of mandamus compelling the auditor to issue warrants for salaries, as in the case of *Kirkham vs. Russell*, 76 Va., 976; or in a case involving the granting of franchises where the council attempts to confer perpetual rights, as in *Detroit Citizens Street Railway Company vs. City of Detroit*; or in the case of matters that do not directly come under the police regulations as to conduct of individuals such as sanitary regulations regulating the sale of meat, which was held in the city of St. Paul vs. *Laidler*, 72 Am. Dec., 89, to be an ordinance in restraint of trade; and ordinances compelling the railroad companies to place watchmen and gates at each crossing, as in *Pittsburg Railroad Company vs. the Town of Crownpoint*, 45 N. E., 587. Thus we see that in all the cases cited by the appellant on this point, only three of them are under police regulations, one of which was a regulation beyond the incorporate limits of the town, and the other two were regulations, which it is true involved the safety and well being of citizens, in attempting to regulate the sale of meat and to have watchmen and gates placed at all crossings. We think, however, that there is a distinction as to the construction of ordinances governing purely local matters directly involving the conduct of individuals in maintaining the peace such as disorderly conduct and vagrancy in which cases the municipal authorities act as an agency of the state and in cases where municipal authorities regulate or attempt to

regulate lines of businesses which regulations are frequently imposed not for the purpose of regulation, but for the purpose of raising revenue and in making provision for the safety of individuals at railroad crossings, which although unreasonable in its application to one or two streets will not be entirely held void on such account, the remedy being to resist its enforcement on such streets, *State vs. Jersey City*, 47 *N. J. L.*, 286, 289.

We respectfully submit that the rule as to the reasonableness of an ordinance is as previously stated and that the decision of the lower court should be affirmed.

Respectfully,

J. A. HELLENTHAL,
SIMON HELLENTHAL,
Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARCHIE A. CLONINGER,

Plaintiff in Error,

vs.

A. H. FINLAISON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Third Division.

Filed
OCT 13 1915
R. D. Monckton,
Clerk.

United States
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ARCHIE A. CLONINGER,

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

Messrs. T. J. DONOHOE and E. E. RITCHIE, Valdez, Alaska,

Mr. O. A. TUCKER, Juneau, Alaska,

Attorneys for the Plaintiff and Plaintiff in
Error.

Mr. MAURICE D. LEEHEY, Seattle, Washington,
817 Alaska Building,

Attorney for Defendant and Defendant in
Error. [2*]

*In the District Court for the Territory of Alaska,
Third Division.*

Filed in the District Court, Territory of Alaska,
Third Division. Oct. 15, 1914. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy.

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINDLANSON,

Defendant.

Amended Complaint.

Comes now the above-named plaintiff and after leave of the Court first had and obtained, files this his amended complaint and for cause of complaint

*Page-number appearing at foot of page of certified Transcript of Record.

against the above-named defendant alleges as follows:

I.

That plaintiff was and at all times hereinafter mentioned qualified to locate, hold and own, mining claims in the Territory of Alaska and to possess the same. That on the 2d day of August, 1913, plaintiff located pursuant to the laws of the United States and the Territory of Alaska a certain placer mining claim known as and called No. 1 Bear Creek Placer mining claim in the White River Recording Precinct, Territory of Alaska, hereinafter more particularly described, and ever since has been, and now is the owner thereof and entitled to the immediate possession of the same.

II.

That on the said 2d day of August, 1913, plaintiff went upon the unoccupied and unappropriated domain in the Territory of Alaska, in the White River Recording Precinct, at a point on Bear Creek, which is tributary of Big Eldorado Creek, the latter being a tributary of Wilson Creek and Wilson Creek being a tributary of Chisana River, and located a placer mining claim on said Bear Creek embracing a tract of land 1320 feet in length and 660 feet in width and named and called said mining claim No. 1 Bear Creek placer mining claim. Said claim is bounded and described as follows: Commencing at the initial stake which is 330 feet more [3] or less from the intersection of said Bear Creek with Big Eldorado Creek in a southerly direction and running thence 330 feet to corner No. 1, running thence 1320 feet southerly

to corner No. 2; thence 660 feet easterly to Corner No. 3; thence 1320 feet northerly to Corner No. 4; thence 330 feet westerly to place of beginning. And appropriated and claimed said mining claim by reason of discovery and location under and by virtue of the laws of the United States and of the Territory of Alaska.

III.

That before making said location, to wit, on the 2d day of August, 1913, said plaintiff made a discovery of gold-bearing placer ground carrying gold in workable quantities at a point within the exterior boundaries of said mining claim as hereinabove described; that at the time of making said discovery he posted conspicuously at the point of discovery a notice of location containing (a) name of the claim, to wit, No. 1 Bear Creek Placer Mining Claim (b) the name of the locator, to wit, Archie A. Cloninger (c) the date of the discovery and posting of notice, to wit, the second day of August, 1913; (d) the number of feet in length and width claimed, to wit, 1320 feet long by 660 feet wide; and in all other respects complied with the laws of the United States and of the Territory of Alaska in regard to the making of discovery and location of placer mining claims. That at the time of the posting of the notice of location, he distinctly marked the location on the ground so that the boundaries might be readily traced by placing at each corner thereof substantial stakes or posts not less than three feet high above the ground and about three inches in diameter and hewed on the sides facing the claim. Said corner posts were marked

with the name or number of the claim and the designation of the corner by number and the corner posts nearest the discovery monument was marked corner No. 1, and the other corner posts were marked in regular rotation. This claim is located on open ground and the side lines were marked by stakes so as to readily lead from one corner to another of such claim, and in all respects the boundaries of said claim are marked as [4] required by law. That within ninety days from the date of said discovery and prior to the filing of the certificate of location the said plaintiff performed or caused to be performed labor upon said claim in developing the same in amount which was and is equivalent in the aggregate to one hundred dollars worth of work based on the going wages in the White River Recording Precinct at that time, which said work constituted the location work as required by the laws of Alaska; that thereafter and within ninety days after the discovery, to wit, on the 16th day of August, 1913, the plaintiff caused to be recorded in the precinct wherein such claim is situated in Volume 1 at page 181 of the records of the White River Recording Precinct, a certificate of location, which certificate contained the name of the claim, the name of the locator, the date of discovery and posting of location notice, the number of feet in length and width claimed, such certificate also set forth a description of such location with reference to natural and permanent monuments, a description of the boundaries, corner posts and markings thereon, and a description of the location work and the place where the same

was performed. Said certificate of location was verified by the plaintiff and locator before a notary public authorized to administer oaths.

IV.

That the plaintiff did not during the calendar month of August, 1913, or during any other month in said year, locate or cause to be located in his name more than two mining claims in the Territory of Alaska.

V.

That the nature of plaintiff's estate in the land embraced in and covered by said mining claim is that of owner of a legally located, unpatented placer mining claim; that the fee of said land still remains in the United States Government; that said plaintiff is the owner of the said mining claim, land and premises under and by virtue of his location and appropriation of the mining laws of the United States and Territory of Alaska and is entitled the immediate possession of the same and the whole thereof. [5]

VI.

That plaintiff being in the possession of said mining claim and premises as aforesaid, the defendant on or about the —— day of August, 1913, unlawfully and without right entered into the possession of the same and ousted the plaintiff therefrom and ever since and now does wrongfully and unlawfully withhold the possession of said mining claim from plaintiff to his damage in the sum of one thousand dollars; that the defendant ever since said date has acted as and claimed to be the owner of said mining claim and premises as aforesaid.

WHEREFORE, plaintiff prays judgment against the defendant for the restitution of and the possession of the above-described mining claim and premises and the whole thereof; and for damages in the sum of one thousand dollars for the wrongful and unlawful withholding of the possession of said mining claim and premises from plaintiff and for his costs and disbursements in this action.

O. A. TUCKER,
T. J. DONOHOE and
E. E. RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Archie A. Cloninger, being first duly sworn, on oath, deposes and says: That he is the plaintiff named in the foregoing amended complaint; that he has read the same, knows the contents thereof, and declares the allegations therein contained to be true.

ARCHIE A. CLONINGER.

Subscribed and sworn to before me this 23d day of March, A. D. 1914.

[Seal]

O. A. TUCKER,
Notary Public for Alaska, Residing at Cordova.
My commission expires July 28, 1917. [6]

Receipt of the foregoing amended complaint by copy is hereby acknowledged this 25th day of March, 1914.

MAURICE D. LEEHEY,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 28, 1914. Arthur Lang, Clerk. [7]

*In the District Court for the Territory of Alaska,
Third Division.*

C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Answer.

The defendant answers the Amended Complaint as follows:

I.

The defendant admits the qualification of plaintiff to locate mining claims in Alaska, but denies every other allegation in paragraph 1 of the amended complaint.

II.

The defendant denies every allegation in paragraph II. of the amended complaint.

III.

The defendant denies every allegation in paragraph III. of the amended complaint.

IV.

The defendant has no knowledge of the facts alleged in paragraph IV of the amended complaint and therefore denies the same.

V.

The defendant denies every allegation in paragraph V of the amended complaint.

VI.

The defendant admits that he has at all times acted as and claimed to be the owner of the mining claim and premises described in the amended complaint, and that he actually holds the sole possession thereof, but denies every other allegation in paragraph VI of the amended complaint.

And the defendant for a further answer and as an [8] affirmative defense to the cause of action stated in the Amended Complaint, alleges as follows:

I.

That at all the times stated in the Amended Complaint, and ever since July 3d, 1913, the defendant was and now is the owner of and entitled to the possession, and during all of said time was and now is lawfully in the possession, by right of discovery and location in accordance with the law and local customs, and regulations, of that certain placer mining location situated within the White River Precinct and Recording District of Alaska, designated as No. 1 on Bear Creek, a tributary of Eldorado Creek, which latter is a tributary of Wilson Creek, flowing into the Shushana River designated by the United States Geological Survey as the Chisana River; that said placer mining location was initiated by a valid discovery of placer gold made by one Andrew M. Taylor as the agent and attorney in fact for and on behalf of this defendant; that said discovery was made on the last named date at a point now included within

the limits of the placer claim herein named; that immediately after said discovery, and on the same day, the said Taylor duly posted notice of such location on behalf of this defendant, designating the claim as No. 1 on Bear Creek, and marked the boundaries thereof by proper stakes and monuments so that the same could be readily traced; that not more than two placer mining locations were made by or on behalf of this defendant within the Territory of Alaska during the said calendar month, or during any calendar month.

II.

That this Court, by its order herein entered on May 7th, 1913, created the White River Precinct and Recording District of Alaska, including therein the region wherein such location was made and where the ground in controversy in this action is situated; that a recorder was appointed for said District, but the exact location of the recording office therein was not designated; that the district so created included [9] practically all of that portion of the Third Judicial Division of Alaska which lies north and east of the summit of the Alaska Range of mountains; that there are no towns whatever situated within said district, and no roads or established trails whatever into or across the same; that the region was wholly inaccessible during the summer months after May 7th, 1913, except by means of poling boats on the larger rivers, and thence across a mountainous and uninhabited country, where no regular lines of travel or communication were established; that the said district is so situated that

communication with its various parts is impossible except at irregular intervals of weeks and months; that the recorder appointed for said district did not arrive therein and no recording office was established therein until on or about July 25th, 1913.

III.

That said Andrew M. Taylor was duly authorized to locate mining claims for this defendant and to do all acts necessary or deemed advisable to perfect the location and record of mining claims in the Territory of Alaska, which authority was contained in a power of attorney duly executed in writing and acknowledged by this defendant on May 29th, 1913; that at all times herein stated this defendant resided outside the Territory of Alaska; that said power of attorney was delivered to the said Taylor, who took the same with him upon a prospecting trip into the region included in the White River Precinct and Recording District of Alaska # with the intention in good faith of promptly recording the same there upon his arrival, but was prevented from doing so by the delay in the arrival of the recorder, and the consequent delay in establishing a recording office in said district; that it was impossible to record said power of attorney in any other recording office in the Third Judicial Division of Alaska without making a trip involving great expense and the loss of at least two months time during the most valuable season for prospecting, and the [10] said Taylor was dissuaded from attempting to record such power of attorney elsewhere by reason of the fact that such recording district had been duly created,

and a recorder duly appointed, and the said Taylor had reason to believe and did believe that such recording office would be promptly established at some convenient place within said district.

IV.

That on July 12th, 1913, the miners and prospectors then in the so-called Shushana region within the limits of the White River Precinct and Recording District as established by the order of this Court, duly assembled in meeting after due notice in writing stating the time and place of the proposed meeting had been publicly posted and circulated for more than five days prior thereto; that said meeting was attended by practically all of the miners and prospectors then in said district, and it was there determined advisable to organize a local mining district and to establish a recording office, which was accordingly done by unanimous vote of all persons, present at said meeting; that thereupon E. Fred Wann was unanimously elected as recorder of said local mining district and he thereupon duly qualified as such and immediately established such recording office and received mining locations and other documents for record, and duly recorded the same, and maintained such office open at all business hours, and the records by him made and established were publicly kept for the inspection of all persons; that such office was so continued until the arrival of the duly appointed United States Commissioner and ex officio recorder for said White River Precinct and Recording District on or about July 25th, 1913, when all records so made and kept by the said E. Fred Wann as rec-

order were promptly delivered to the recorder appointed by this Court, and the same were thereupon duly transcribed and recorded in the official records of the said White River Precinct and Recording District of Alaska and are now recorded and maintained therein.

V.

That the said power of attorney from the defendant [11] to said Andrew M. Taylor was duly recorded with the said E. Fred Wann on July 12th, 1913, and the same was thereafter on or about July 25th, 1913, duly recorded at page 18 in volume 1 of the records of the White River Precinct and Recording District of Alaska, and is now of record therein; that said Taylor perfected the location of the placer mining claim designated as No. 1 on Bear Creek and duly executed on behalf of this defendant, and filed for record with the said E. Fred Wann on July 12th, 1913, a notice of location thereof stating the name of the claim, the name of the location, the date of discovery and posting of the notice of location, the number of feet in length and width claimed, and the description of the same with reference to natural objects and permanent monuments, so that the claim might be readily located and the boundaries thereof readily traced upon the ground, and the same was thereafter, on or about July 25th, 1913, duly recorded at page 21 in volume 1 of the official records of the White River Precinct and Recording District of Alaska and is now of record therein.

VI.

That on or about August 5th, 1913, the plaintiff

made a clandestine and unlawful entry upon a portion of the ground included in said placer location designated as No. 1 on Bear Creek, then and now possessed and occupied by the defendant, and attempted to post thereon, and made a pretended posting thereon of an alleged notice of placer location; that all the acts done by the plaintiff and in his behalf in connection with the pretended location of such alleged placer claim were done while trespassing upon the rights and property of the defendant, and over the protest of the defendant and his representatives upon the ground.

WHEREFORE, the defendant, having fully answered, prays that plaintiff take nothing by his amended complaint, but that the defendant be decreed to be the owner and entitled to the possession of the placer mining claim designated as No. 1 on Bear Creek as herein described, and that defendant have judgment [12] against plaintiff for costs.

MAURICE D. LEEHEY,

J. J. FINNEGAN,

Attorneys for Defendant.

United States of America,

Territory of Alaska,—ss.

Maurice D. Leehey, being first duly sworn, says: That he is the attorney for the defendant A. H. Finlaison, in this action; that he has read the foregoing answer to the amended complaint and knows the contents thereof; that the said defendant is at present absent from the Territory of Alaska, and for that reason this verification is made by affiant as his attorney; that affiant believes all the allegations in

the foregoing answer to be true.

MAURICE D. LEEHEY.

Subscribed and sworn to before me this 26th day of March A. D. 1914.

O. A. TUCKER,
Notary Public.

My commission expires July 28, 1917.

Service accepted and copy received March 26th, 1914.

O. A. TUCKER,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 27, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy.
[13]

*In the District Court for the Territory of Alaska,
Third Division.*

C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Motion to Strike.

Comes now the above-named plaintiff and moves this Honorable Court for an order striking from defendant's answer on the ground that the same is irrelevant matter and does not constitute a defense to any of the allegations contained in plaintiff's amended complaint, as follows:

I.

Moves to strike all of paragraph II from defendant's affirmative and further answer.

II.

Moves to strike all that portion of paragraph III of defendant's further answer and affirmative defense following the phrase "White River Precinct and Recording District of Alaska," contained on the 10th and 11th lines of said paragraph III.

T. J. DONOHUE,
E. E. RITCHIE,
Attorneys for Plaintiff.

Service of the foregoing motion is hereby accepted this 30th day of March, 1914, by receiving a copy thereof.

M. D. LEEHEY,
J. J. FINNEGAN,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 30, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy.
[14]

*In the District Court for the Territory of Alaska,
Third Division.*

Special March 1914 Term—March 31st, 15th Court
Day.

Entered Cordova Journal No. 2, Page 212.

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Minute Order Denying Motion to Strike.

Comes now the above-named plaintiffs, by their attorneys, T. J. Donohoe and E. E. Ritchie, and move the Court for an order to strike certain portions of defendant's answer; defendant in the above-numbered are represented by Maurice D. Leehey and J. J. Finnegan. Whereupon after arguments by the respective counsel,

IT IS ORDERED by the Court that said motion be and the same is hereby denied, to which order and ruling of the court plaintiff excepts and exception is duly allowed,

WHEREUPON IT IS ORDERED that defendant have until one day after the close of the trial in cause No. C-73, Dan D. Sutherland, vs. F. W. Purdy, in which to file their reply. [15]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Reply.

Comes now the above-named plaintiff and for reply to the affirmative and further answer of the defendant admits, denies and alleges as follows:

1.

Referring to the first paragraph of said affirmative and further answer plaintiff denies each and every allegation therein contained.

2.

Referring to the second paragraph of defendant's affirmative and further answer plaintiff admits that this Court, by order entered on the 7th day of May, 1913, created the White River Recording Precinct and admits that the ground in controversy in this action is situated in the White River Recording Precinct and admits that a recorder was appointed for said precinct, but denies each and every other allegation in such paragraph contained and alleges that the order dated May 7, 1913, appointing a recorder for said precinct specified and designated the place where said recorder would hold his office as "Wiley" at the junction of Sola Creek and the White River.

3.

Referring to the third paragraph of said further answer and affirmative defense plaintiff denies each and every allegation therein contained. [16]

4.

Referring to the fourth paragraph of said further answer and affirmative defense, plaintiff denies each and every allegation therein contained.

5.

Referring to the fifth paragraph of said further answer and affirmative defense, plaintiff denies each and every allegation therein contained and alleges that the instrument therein referred to as a power of attorney, recorded on page 18 of Volume One of the records of the White River Recording Precinct is in words and figures as follows, to wit:

“No. 1—A. H. Finlaison to A. M. Taylor, absolute.

Power.

Attorney. Drawn by G. C. Cole, American Consul, Dawson.
29th May 1913. Rec. 8:35 A. M. July 12/13.”

6.

Referring to the sixth paragraph of defendant's further answer and affirmative defense plaintiff denies each and every allegation therein contained.

WHEREFORE plaintiff prays judgment in accordance with the prayer of his amended complaint.

T. J. DONOHUE, and
E. E. RITCHIE,

Attorneys for Plaintiff.

Service of the above and foregoing Reply is hereby

accepted and verification of said reply is hereby waived.

LEEHEY & FINNEGAN,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. April 4, 1914. Arthur Lang, Clerk. By K. L. Monahan, Deputy.
[17]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAINSON,

Defendant.

Bill of Exceptions and Transcript of Record.

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard at Cordova, in the Third Judicial Division, Territory of Alaska, on Thursday, the 9th day of April, 1914, at 10 o'clock A. M. of said day, before the Honorable FRED M. BROWN, Judge of said court and a jury:

The plaintiff herein being represented by his attorneys and counsel, T. J. Donohoe, Esq., and E. E. Ritchie, Esq.:

The defendant herein being represented by his attorneys and counsel, Maurice D. Leehey, Esq., and J. J. Finnegan, Esq.:

The jury having been empaneled, opening state-

ments were made by Mr. Ritchie on behalf of the plaintiff and by Mr. Finnegan on behalf of the defendant:

WHEREUPON the following proceedings were had and done: [18]

CLONINGER, ARCHIE A.—

Direct Ex.....	2
Cross.....	9
MADDOX, E, C.....	18

[19]

[Testimony of Archie A. Cloninger, for Plaintiff.]

ARCHIE A. CLONINGER, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. RITCHIE.

Q. You may state your name.

A. Archie A. Cloninger.

Q. Where do you reside? A. Chitina, Alaska.

Q. How long have you resided in Chitina?

A. Since November, 1912.

Q. What are you doing at Chitina?

A. Working in the hotel there for my brother.

Q. You are the plaintiff in this case? A. I am.

Q. Are you an American citizen? A. I am.

Q. Where were you born?

A. Portland, Oregon.

Q. And have lived in the United States all your life?

A. And have lived in the United States all my life.

Q. You have lived in Alaska a year and a half?

A. Almost, yes; came here November, 1912.

Q. Where did you come from to Alaska?

(Testimony of Archie A. Cloninger.)

A. Seattle.

Q. Were you ever in the Shushana district?

A. I was in the Shushana district last summer in the month of July and August, the last of July and along the fore part of August.

Q. When did you arrive there?

A. The 30th day of July, 1913.

Q. In what part of the district did you first stop?
[20*—2†]

A. At Johnson Creek, about a quarter of a mile below the mouth of Bonanza.

Q. Who was with you, if anyone?

A. Ed Maddox and Shorty Gwin.

Q. Did you do any prospecting on the creeks?

A. I did.

Q. Where did you go first?

A. I went up Bonanza, up Little Eldorado, Gold Run and crossed the divide and went down Big Eldorado.

Q. When did you go on Big Eldorado?

A. On the first day of August.

Q. When did you go on to Bear Creek?

A. On the first day of August, the forenoon.

Q. Is Bear Creek a tributary of Big Eldorado?

A. It is.

Q. You got on to Bear Creek the same day you did Big Eldorado, the first of August? A. Yes, sir.

Q. What time of the day?

A. Between nine and ten o'clock in the morning.

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Archie A. Cloninger.)

Q. Who was with you?

A. I was by myself that time.

Q. What did you do on Bear Creek?

A. I prospected some along the creeks and examined some of the claims and also location notices.

Q. Did you go onto the ground which you are claiming in this action? A. I did.

Q. Did you find anything on the ground in the day of artificial monuments or posts? [21—3]

A. I found a monument and some corner stakes; there was absolutely no writing on them to show what they were there for.

Q. You found a monument? A. I did.

Q. Where was that?

A. I found the center end monument; it was supposed to be the initial monument, I guess.

Q. At which end?

A. The lower end of the claim.

Q. How far is that from Big Eldorado Creek, from the junction?

A. Just one claim, half a claim width, 330 feet.

Q. There is a part of a claim lying between Bear Creek No. One claim, the subject of this action, and Big Eldorado Creek?

A. Yes, the side lines of No. One on Big Eldorado Creek ran along there.

Q. Did you find any notice on that claim?

A. Yes, sir.

Q. Do you remember what statements were contained in it?

A. Why, it was a notice of location for Mr. Fin-

(Testimony of Archie A. Cloninger.)

lainson, by A. M. Taylor—power of attorney .

Q. Did you notice the date on it?

A. I think it was staked on the second day of July.

Q. What did you do that day on the ground, anything? The first day of August?

A. Why, I panned a little along the creek there.

Q. Did you find anything as the result of your panning?

A. Yes, I found some colors, just very light colors.

Q. Did you pan more than one pan?

A. Yes, I panned several pans. [22—4]

Q. What did you find, each time about the same?

A. About the same; once or twice I was skunked.

Q. What did you do that night, did you remain there?

A. No, sir, I went back to the recorder's office and asked the deputy recorder, Mr. Waller, asked him to see the books and he said, I will show you the books.

Q. That was that night, the first of August?

A. That was that night, the first of August. So we looked at the books and couldn't find no place where A. M. Taylor had a power of attorney recorded there and he was acting under a power of attorney for Finlaison.

Q. What books did you look at?

A. Just the one book he had there that day.

Q. Did he tell you they had only one book?

Mr. LEEHEY.—We object to any statement made by Mr. Waller.

Objection overruled. Defendant allowed an exception.

(Testimony of Archie A. Cloninger.)

A. Why, he said, "This is the only book we have up to this time."

Q. What did you and Mr. Waller do with reference to that book?

A. We looked in the book for the power of attorney and there was no record there for Taylor or Finlainson.

Q. There was no record of a power of attorney to Taylor from Finlainson? A. No, sir.

Q. Now, what did you do the next day, if anything?

A. I went back there and staked the property. I was told before I left if the power of attorney was not recorded previous to the staking, or they didn't have a power of attorney, the ground was open for relocation and I was going according to law.

Q. (By the COURT.) What date was this?

A. I went back on the second day of August. [23—5]

Q. You say you had been advised you could relocate any claim which purported to be located by someone under a power of attorney when he didn't have any power of attorney?

A. Yes, I was advised; we had quite a discussion at Chitina and I was not satisfied and I seen the Commissioner and also an attorney to find out and paid him a fee to find out.

Q. That was before you went in?

A. That was before I went in, and they advised me it must be recorded previous to the location.

Q. What did you do that morning you went back,

the morning of the second of August?

A. I went back and staked the ground—put up my initial stake or lower center end monument.

Q. Where did you put that?

A. Right at the creek, just at the side line of No. One Big Eldorado.

Q. At each end of the claim located?

A. At each end of the claim.

Q. That would be your center end stake?

A. That would be my center end stake.

Q. Did you give the claim a name?

A. Bear Creek No. One.

Q. Did you put up any monument there?

A. I put up a monument of rock about three feet or three and a half high, probably four feet.

Q. And what did you do about a notice?

Mr. LEEHEY.—The defendant will admit that the pretended location of Mr. Cloninger was sufficiently marked on the ground on the second day of August, 1913.

Mr. RITCHIE.—We offer a copy of the original notice posted so [24—6] as to get it into the record.

By the COURT.—What does the defendant admit?

Mr. LEEHEY.—That the claim was sufficiently marked on the ground.

The WITNESS.—This is the notice I put on Bear Creek No. One on August 2d, 1913. That is a copy of the notice.

By the COURT.—The defendant admits the proper marking on the ground and the posting of

(Testimony of Archie A. Cloninger.)

notice on the ground according to law on the second day of August, 1913?

Mr. LEEHEY.—Yes, sir.

(The copy of notice is admitted in evidence and marked Plaintiff's Exhibit "A.")

Q. That is all you did that day?

A. That is all I did that day.

Q. Did you go back to the claim afterwards?

A. I went back to the claim on the 5th, got there the morning of the 5th and started to work.

Q. Who was with you?

A. Ed Maddox was with me and we did the assessment work.

Q. What did you do?

A. We put in an open cut about forty feet long and I think it was either four and a half feet deep or three feet deep—it was 40 feet by $4\frac{1}{2}$ by 3.

Q. How many days' work How many days did you work?

A. Five days, the two of us—that made ten days for one man.

Q. Did you afterwards file a certificate of location under the statute?

A. Yes, sir; after we got our assessment work done we filed it—recorded the location notice and also the assessment work.

Mr. RITCHIE.—We offer this in evidence.
[25—7].

Mr. RITCHIE.—We desire at this time to offer a certified copy of the record of this certificate of location showing the assessment work as required by the statute.

(Testimony of Archie A. Cloninger.)

Mr. LEEHEY.—I want to make this objection. Defendant objects to the admission in evidence of the purported location notice and proof of assessment work of the plaintiff Cloninger, First, for the reason that the same contains no description of the location of the claim with reference to natural objects, permanent monuments or well-known mining claim; Second, that there is no description of the boundaries, corner monuments or markings on the ground; Third, that there is no sufficient description of the location work alleged to have been performed and no description whatever of the place on the claim where the same was performed; and Fourth, that the alleged location notice is not verified as required by law. The defendant urges these objections especially in view of the requirements of the Act of the Alaska Territorial Legislature approved April 30, 1913.

By the COURT.—This notice is open to some criticism. It differs from the one introduced in the last case; it is different as to form; it contains some things omitted there and does not contain some things included in the other. I think it substantially complies with the essential requirements of the statute and the objection will be overruled. To which ruling of the Court defendant is allowed an exception.

Mr. LEEHEY.—The objections made by the defendant simply went to the sufficiency of the document and manner of proof. There is a general agreement between counsel in all these [26—8] cases

(Testimony of Archie A. Cloninger.)

that copies may be made from the official records of the White River Recording Precinct now in the possession of the clerk of the court and may be certified by the clerk of the court to the same effect as if certified by the duly appointed recorder of the precinct. We admit these are copies of the record.

By the COURT.—The record will so show.

(The Notice of Placer Location with proof of labor attached admitted in evidence and marked Plaintiff's Exhibit "B.")

Mr. RITCHIE.—You may cross-examine.

Cross-examination by Mr. LEEHEY.

Q. You say you went on this ground on the first day of August, 1915? A. Yes, sir.

Q. And you only arrived in that Shushana region on the evening of the 30th of July?

A. I arrived in the Shushana region on the evening of the 30th of July, yes, sir.

Q. And went directly to this property?

A. I went over to the property the next morning, on the first day of August.

Q. You had some previous advice concerning this, hadn't you?

A. I heard that all the creeks were staked.

Q. And you heard that this staking by power of attorney was invalid and insufficient to hold ground unless the power of attorney was recorded before staking? Yes, sir.

Q. And you heard this particular claim was staked, No. One on Bear Creek? [27—9]

A. I went to find the Judge.

(Testimony of Archie A. Cloninger.)

Q. Wasn't it evident to you in advance?

A. No, sir, it was not. I was walking up the creeks and I see all the claims had location notices made out on boards.

Q. Then you just went along the creeks looking for some claim located by a power of attorney where the power of attorney was not recorded?

A. No, sir.

Q. How came you to go out so quickly after your arrival in the camp and find this particular claim?

A. I suppose I was going there to sit down—

Q. Answer my question.

A. I went up there on the first day of August; I went in there to locate ground and prospect and that is what I done when I went in there.

Q. This claim is about eight or ten miles from where you camped? A. No, sir.

Q. Where did you camp?

A. Camped at the mouth of Bonanza, about a quarter of a mile.

Q. When you first went in there—did you camp that very night at the mouth of Bonanza?

A. Yes, sir; about a quarter of a mile below the mouth of Bonanza on Johnson Creek.

Q. How far is that as you would have to travel to go to Big Eldorado Creek?

A. About five miles.

Q. Then you went right over there the next morning?

A. I went right up the creeks and crossed there.

Q. And walked up to this particular claim? [28
—10]

(Testimony of Archie A. Cloninger.)

A. No, sir, not up to this particular claim; I crossed right—went over the divide to the head of Eldorado.

Q. Where did you strike Eldorado Creek?

A. At the head of Eldorado.

Q. And walked down the creek?

A. And walked down the creek.

Q. To this claim? A. To this claim.

Q. This was the first one you found staked by power of attorney?

A. This was not the first claim I found.

Q. That you found staked by power of attorney I say? A. No, sir.

Q. Did you find any other claim staked by power of attorney before you got to this one?

A. No. One.

Q. Was that staked by power of attorney?

A. I am pretty sure it was staked by power of attorney.

Q. Do you recall by whom?

A. Why that was a claim that the notices were mixed up and we couldn't find out just how they lay, how the ground lay.

Q. Now, is it not a fact that you were looking for some claim that was staked by power of attorney?

A. I was looking for ground.

Q. And you were looking for some claim located by power of attorney, too, were you not? You had in mind that a location made by power of attorney, without the previous record of that power of attorney, was invalid, and you were looking for that sort

(Testimony of Archie A. Cloninger.)

of claim? A. I had in mind they were valid.

Q. If staked by power of attorney? [29—11]

A. Yes, sir.

Q. And the power of attorney was not previously recorded?

A. And the power of attorney was not previously recorded—that the ground was open to relocation.

Q. You mean invalid—you said valid?

A. I mean invalid.

Q. And you were looking for that sort of a claim?

A. Yes, sir.

Q. And when you found this claim you immediately went back to the recorder's office to investigate?

A. No, I went back to Big Eldorado and when I went to camp that night I investigated.

Q. You noticed several claims recorded by power of attorney? A. Yes, sir.

Q. And you went back to look up the records to see if they were recorded? A. Yes, sir.

Q. And you found what you were looking for?

A. I found what I was looking for.

Q. So you knew that this particular claim was ground that was included in the claim called No. One Bear Creek located by Taylor for Finlaison, didn't you?

A. That is what I looked up.

Q. And you mean to say that you knew the ground was already claimed by another?

A. They had a location notice on there.

Q. And you knew they were claiming it?

(Testimony of Archie A. Cloninger.)

A. Yes, they were claiming it, but not according to the law.

Q. You knew they were claiming it just the same?

A. Yes, sir. [30—12]

Q. What attorney in Chitina was it told you these claims were invalid?

A. Paul d'Heirry, our Commisioner.

Q. Did you talk to Mr. Foster about it?

A. I talked to Mr. Foster also and Paul d'Heirry was with him.

Q. And they told you such locations were invalid?

A. Yes, sir.

Q. And you concluded you would go over and get some of those invalid locations? A. No, sir.

Q. Have you ever been in a mining camp before in your life? A. No, sir.

Q. You never did any placer mining?

A. I never did any placer mining.

Mr. LEEHEY.—That is all.

(By Mr. RITCHIE.)

Q. How many mining claims did you locate during the month of August? A. Two.

Q. What were they?

A. No. One Bear Creek and No. 4 Below Upper Discovery on Big Eldorado.

Q. Were you interested in any other claims?

A. No, sir, only Mr. Maddox, my partner, located a claim in Skookum Gulch, known as No. 2a.

Q. Does he have an interest in this claim with you?

A. Maddox and I are in together on all my claims.

(Testimony of Archie A. Cloninger.)

Q. What interest did you have in the locations you made?

A. Maddox and I were sent in there by grub-stake. [31—13]

Q. And what was your interest in it?

A. My interest has been one-quarter of each claim.

Q. And you had a quarter interest in each of those two claims you located, which would be half a claim? A. Yes, sir.

Q. And what interest did you have in anything located by Maddox?

A. I have the same in the Maddox claims I did in my own.

Q. He located one claim?

A. He located one claim and I located two.

Q. You had three-quarters of a claim, a quarter interest in three claims? A. Yes, sir.

Q. You arrived the night of the 30th of July?

A. Yes, sir.

Q. And went up to this creek on the first of August? A. Yes, sir.

Q. The second day after your arrival?

A. The second day after my arrival—the first day I went up to where James was sluicing and along Eldorado and back to the camp.

Q. Mr. Leehey wanted to know if you were out there looking for claims located by power of attorney. Was there any general talk up there about there being lots of claims located by power of attorney?

A. That was the general talk of the camp.

(Testimony of Archie A. Cloninger.)

(By Mr. LEEHEY.)

Q. Who is your other partner besides Mr. Maddox?

A. Mr. Tom Cloninger and Mr. A. C. Murphy.
[32—14]

Q. Where do they live? A. In Chitina.

Q. Then Tom Cloninger, A. C. Murphy, Mr. Maddox and yourself own a quarter interest in whatever location you claim in this case? A. Yes, sir.

Q. Now, you say you also located No. One Above Discovery on Little Eldorado? A. I did not.

Q. What was your other claim?

A. Number 4 Below Upper Discovery on Big Eldorado.

Q. There is a claim that was previously located by Mr. Thomas Doyle?

A. Yes, sir, for Asa Markley.

Q. And that is another claim you thought was invalid because located by power of attorney?

Mr. RITCHIE.—We object to that as irrelevant and immaterial and not cross-examination.

Objection sustained. Defendant allowed an exception.

Q. You have testified concerning your interview with Mr. Waller, the deputy recorder, and I believe stated he had then in his possession only one book. I now ask you to examine the book which is marked Volume One of the records of the White River Recording Precinct and state whether or not that is the same books which Mr. Waller showed you at that time?

(Testimony of Archie A. Cloninger.)

A. I can look at the book on the outside and say it is not the same book; the book we had in there was a black book if I am not mistaken.

Q. You say it is not the book he had? [33—15]

A. I don't think it is.

Q. Are you positive it is not?

A. I couldn't say positive, it don't look like the book we had.

Q. This is a black book except it has red trimmings—or a blue-black book, unless I am color blind?

A. I guess you are color blind—it is not black.

Q. You are very positive that this is not the book that Mr. Waller showed you?

A. I wouldn't swear positively but I don't think it is the book.

Q. Examine the contents of this book,—that will assist you in reaching a positive statement; just look at the contents of the book and see if you can recognize anything in it.

A. I never had the book in my hand. Mr. Waller got the book and we looked through it and he said there was no power of attorney that was recorded.

Q. You took his word for it?

A. Mr. Waller took the book and he showed me—he said, there is absolutely no power of attorney recorded here; I had the book in my hand as I have now.

Q. Did you look at the pages? A. Yes, sir.

Q. Did you read the pages? A. Yes, sir.

Q. I want to know whether, when you say there was nothing in the book, you are testifying to what

(Testimony of Archie A. Cloninger.)

you know yourself positively or what Mr. Waller told you.

A. What I know myself and what he told me.

[34-16]

Q. Both? A. Yes, sir.

Q. You swear that book contained nothing of a power of attorney from Finlainson to Taylor?

A. Yes, sir, at that time.

Q. And you also swear positively that this book marked Volume One of the records of the White River Recording Precinct is not the book you saw?

A. I will not swear positively, but I don't think it is the book.

Q. You don't think so? A. No, sir.

(By Mr. RITCHIE.)

Q. How much of a search did you make in the book?

A. We started in along about the first of the book; he said, we will start in in July, so we started in about the month of July and went through.

Q. Did you turn it page by page?

A. I turned it page by page, yes, sir.

Q. As far as the records appeared in it?

A. Yes, sir.

Q. How much of the book was full at that time?

A. About half full, I suppose.

(By Mr. LEEHEY.)

Q. About how many pages were there in the book do you suppose? A. I don't know.

Q. Was it a book as large as this one?

A. No, I don't think it was as large.

(Testimony of Archie A. Cloninger.)

Q. This book appears to contain 300 pages.

A. The other book then probably was a couple of hundred pages. [35-17]

Q. Were they as large as those, the sheets?

A. About the same sized book, yes, sir.

Witness excused.

[Testimony of E. C. Maddox, for Plaintiff.]

E. C. MADDUX, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. RITCHIE.

Q. What is your name? A. E. C. Maddox.

Q. Where do you reside? A. Kennecott.

Q. How long have you lived in Alaska?

A. Sixteen years.

Q. What is your business? A. Mining.

Q. Has that been your business practically all the time? A. Yes, sir.

Q. You were a miner outside before you came to Alaska? A. No, sir.

Q. Are you an American citizen? A. I am.

Q. What is your native state? A. Kentucky.

Q. You came from there to Alaska?

A. Yes, sir.

Q. In '98? A. In '98.

Q. Were you ever in the Shushana district?

[36-18]

A. I was.

Q. When did you go in there?

A. Arrived the 30th day of July.

(Testimony of E. C. Maddox.)

Q. In company with whom, if anybody?

A. Archie Cloninger and Shorty Gwin.

Q. Were you interested with Cloninger in any way? A. Partner on that trip.

Q. Did he have any other partner besides yourself?

A. His brother and Murphy financed the trip for us.

Q. You were grubstaked, you and Archie, by Tom Cloninger and Mr. Murphy? A. Yes, sir.

Q. And what interest were you to have in anything you might locate, were you to divide equally, a quarter interest each? A. Yes, sir.

Q. Where did you stop the night you got into the Shushana district?

A. A quarter of a mile below the mouth of Bonanza, on what is known as Johnson Creek.

Q. Were you ever on the claim known as No. One Bear Creek? A. Yes, sir.

Q. When did you go on there?

A. Some time in August.

Q. About what time? The exact date is not important.

A. Somewhere along between the 5th and 15th.

Q. Did you go there with anybody?

A. Archie Cloninger, yes.

Q. What did you go there for?

A. To do the assessment work necessary, One hundred dollars worth of work necessary before recording the claim. [37-19]

(Testimony of E. C. Maddox.)

Q. And what did you and Archie Cloninger do there?

A. We started about 30 or 40 feet from his initial monument and run an open cut about 40 feet long the best I remember.

Q. How many days did you and Cloninger work there?

Mr. RITCHIE.—I didn't get those dimensions.

Mr. LEEHEY.—We admit that, the sufficiency of the work.

Q. Did you see any work elsewhere on the claim, any assessment or development work?

A. No, sir.

Q. Did you go over the claim to any extent?

A. Yes, sir.

Q. Pretty thoroughly?

A. Walked over it two or three times to the upper end and back.

Q. What were the going wages of the camp at that time?

A. It was supposed to be \$12.50 a day; there wasn't much to go by, there wasn't anybody employing any help up there outside of James and Hamshaw.

Q. You two did ten days work? A. Yes, sir.

Mr. RITCHIE.—That is all.

Mr. LEEHEY.—We have no cross-examination.
Plaintiff rests.

[Motion for a Nonsuit, etc.]

Mr. LEEHEY.—The defendant moves for a nonsuit and that the jury be instructed to bring in a verdict in this case for the defendant, for the reason that it appears from the testimony that the ground attempted to be located by the plaintiff on the 2d day of August, 1913, as a placer mining [38-20] claim was not at that time according to the testimony of the plaintiff himself open and unoccupied public mineral lands of the United States and for the reason that the testimony shows that on that date, when the plaintiff went upon this ground, he observed there the notice of location and the stakes or monuments of the defendant, claiming the ground under a location made in July as a placer mining claim, designated as No. One on Bear Creek and the plaintiff himself expressly states that he made the location of the ground in accordance with advice theretofore given him that such location had been made by power of attorney and such power of attorney was not of record, the location was invalid and for that reason he located this ground or attempted its location as a placer mining claim. That is our motion and we submit the motion should be sustained.

By the COURT.—In this case the plaintiff admits he went on this ground and found a notice of location and found the stakes on the ground and as I have held in all these cases where the question has arisen, it was not the purpose or intent of this Wickersham Act to require the recording

of the power of attorney prior to the initial step or the first step in making the location. I do not believe in this case that it is incumbent upon the defendant to go any further and I believe the motion ought to be granted and the motion will be granted. The jury will be instructed to bring in a verdict in favor of the defendant.

Mr. RITCHIE.—We save an exception to the order of the Court granting the motion for a nonsuit and we also except to the order directing the jury to bring in a verdict, for the reason that if the nonsuit is granted, there is no room left for a directed verdict. The motion for a nonsuit I [39-21] take it disposes of the case and no verdict is necessary.

By the COURT.—I am not clear upon this matter. We don't want to make any mistake about this part of it. You had better take the time to look into it and see that the proper course is followed.

Mr. RITCHIE.—At this moment I can recall but one case of a motion for nonsuit being granted, but it appears in our practice that the motion for a nonsuit disposes of the case.

By the COURT.—I am satisfied on the record made that there is no use proceeding any further, that the plaintiff has not sustained the cause of action. The ground was not open, unappropriated ground at the time on the statements and admissions of the plaintiff himself but I will take until two o'clock to enquire into the matter and I should like to have counsel do so also. The court will be in recess until 2 o'clock.

Afternoon Session.

By the COURT.—In this case of Cloninger versus Finlaison I have found since the adjournment this morning that it is necessary to modify the ruling that I have made. In explanation I might say this—that these cases were delayed in getting at issue. I tried to look into them before coming down to Cordova at all, but they were not at issue and I have never had the opportunity and time I would like to have had to look into the various questions, some of which are new to this jurisdiction. This is a very important matter and I do not desire to act hastily. It is of the utmost importance that these questions be settled and settled right and as speedily as possible. I desire to make [40–22] the record here so that either side, if they feel aggrieved may present it fairly and as speedily as possible to the Appellate Court, because it is important to every one to have the law settled. Now I believe that this exhibit, marked Plaintiff's Exhibit "B", which is the declaratory statement or verified notice of location, together with proof of location work, does not conform to the requirements of the statute. I feel satisfied that is the law and while it was admitted and a similar one, differing somewhat in the facts set out in it was admitted in another case, I feel that it is right to rule in this case that this notice of placer location, Plaintiff's Exhibit "B", which was objected to at the time by the attorney for the defendant be excluded and the objection will be sustained—that will be the order.

Mr. DONOHOE.—We desire an exception to the

ruling of the Court. (Exception allowed.)

Mr. DONOHOE.—As I understand it that exhibit becomes part of the record, subject to your ruling; the exhibit goes up with the record.

By the COURT.—I presume so.

Mr. LEEHEY.—If not, it may be properly marked for identification.

By the COURT.—The record will show the ruling of the Court before the case was submitted or final action taken, that the objection to this is sustained.

Mr. DONOHOE.—And it may also show that the exhibit will go up as part of the record?

By the COURT.—Yes, sir. Mr. LEEHEY, do you desire to amend or change your motion after this ruling of the Court? [41-23]

Mr. LEEHEY.—My impression is that the motion is designed as I presented it to include that objection; I had that in mind as one of the grounds of insufficiency of evidence and our motion is generally a motion for nonsuit.

By the COURT.—Your motion may be renewed at this time or after the ruling.

Mr. LEEHEY.—The defendant now moves for a nonsuit in this case and for a judgment of nonsuit against the plaintiff, and that the jury be directed to render a verdict herein in favor of the defendant, for the reason that the plaintiff has failed to make out a case sufficient to go to the jury and such a showing only has been made on the part of the plaintiff as would require the Court to set aside any verdict that the jury might hereafter render in favor of the plaintiff.

By the COURT.—The motion will be granted. I think the proper practice is the dismissal of the action by a judgment of nonsuit, so that the jury will be discharged from further consideration of the case.

Mr. RITCHIE.—I understand the Court will grant the nonsuit and does not direct a verdict?

By the COURT.—Yes, sir.

Mr. RITCHIE.—We save an exception to the order granting a nonsuit.

Exception allowed.

By the COURT.—Gentlemen of the Jury, you may be discharged from further consideration of the case.

[42-24]

**[Certificate of Official Stenographer to Transcript of
Testimony.]**

I, Isaac Hamburger, do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such official stenographer I reported the proceedings had at the trial of the above-entitled cause, to wit, Archie A. Cloninger versus A. H. Finlaison, No. C-75 of the records of said court; that the above, consisting of twenty-four (24) typewritten pages is a full, true and correct transcript of the testimony introduced at said trial.

Dated at Valdez, Alaska, this 11th day of June, 1914.

I. HAMBURGER. [43]

**[Certificate of Clerk U. S. District Court to
Plaintiff's Exhibit "B."]**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original Notice of Location and Proof of Labor Recorded in Book 1, page 181, of the White River Precinct, Territory of Alaska, Third Division, Plaintiff's Exhibit "B," as the same appears on file and of record in my office.

In Testimony Whereof, I have subscribed my name and affixed the seal of the said Court at Valdez, Alaska, this 7th day of April, 1914.

[Seal]

ARTHUR LANG,
Clerk.

By K. L. Monahan,
Deputy. [43a]

**[Plaintiff's Exhibit "B"—Notice of Placer
Location.]**

NOTICE OF PLACER LOCATION.

Notice is hereby given that the undersigned, a citizen of the United States has on this 2d day of August, 1913, discovered at the place where this notice is posted a valuable placer deposit bearing gold and I do hereby locate and claim the same as the No. 1 Bear creek placer mining claim. This claim is situated in the White River Mining District, Territory of Alaska.

The point of discovery whereon this notice is posted is situated close to initial post or monument Bear Creek is tributary to Big Eldorado and from thence the boundaries of said claim are marked as follows: (Initial Post.)

I claim 1320 ft. up stream from this post and 330 ft. each side of this post (20 acres). The boundary of this claim is marked by 4 corner posts and 2 center posts. The 4 corner posts are willow posts and centers are rock monuments.

Notice dated and posted on the date aforesaid.

ARCHIE C. CLONINGER,

Locator and Claimant.

Filed by A. Cloninger at 11 A. M., Aug. 16, 1913.
H. E. Morgan, Recorder. By M. R. Healy, Deputy.
2.00

PROOF OF LABOR.

White River Recording Office. August 16, 1913.

I, the undersigned, hereby certify that I have done more than One Hundred Dollars' worth of labor and improvements on the No. 1 Bear Creek Placer Claim which consists of Open Cut $4\frac{1}{2}'$ by $3'$ by 40 feet, and was done in ten eight hour days.

ARCHIE A. CLONINGER.

Subscribed and sworn to before me this 16th day of August, 1913.

HORATIO E. MORGAN,

Notary Public.

Filed for record by A. Cloninger, at 11 A. M., Aug. 16, 1913. H. E. Morgan, Recorder. By M. R. Healy, Deputy. Seal, 3.00. Plaintiff's Exhibit "B." [44]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Judgment.

This cause came regularly on for trial in open court on April 9th, 1914, and the parties were present in person and by their respective counsel, and the cause proceeded to trial and the jury was duly sworn and empaneled to try said case, and testimony on the part of the plaintiff was introduced.

Whereupon the plaintiff announced that his testimony in chief was concluded and rested his case, and then the defendant moved for a nonsuit and for judgment in favor of the defendant for the dismissal of this action, which motion was argued by counsel for the respective parties and sustained by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by this action, but that his complaint be dismissed, and that the defendant, A. H. Finlaison, have judgment against the plaintiff, Archie A. Cloninger, for his costs to be taxed by the clerk.

Done in open court and signed and order entered herein this 11th day of April, 1914.

FRED M. BROWN,
Judge.

Attest: ARTHUR LANG,
Clerk.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Apr. 11, 1914. Arthur Lang, Clerk.

Entered Court Journal No. C-2, page No. 250.
[45]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

**Order [Extending Time to October 15, 1914, to File
Bill of Exceptions, etc.].**

On motion of plaintiff for an order of this Court extending the time in which plaintiff may prepare, settle and file his bill of exceptions to be used on a writ of error from the judgment of this court to the United States Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of the cost bond on said writ of error or appeal.

IT IS HEREBY ORDERED that said plaintiff shall have to and including the 15th day of October,

1914, in which to prepare, settle and file his said bill of exceptions.

IT IS FURTHER ORDERED that the cost bond of plaintiff in the matter of said appeal or writ of error be, and the same is hereby, fixed at the sum of Five Hundred (\$500.00) Dollars, the sureties of said bond to be approved by the clerk of this court in case the Judge of this court is absent from Valdez, Alaska, when said bond is presented for filing.

Done in open court at Cordova, Alaska, this 10th day of April, 1914.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Apr. 10, 1914. Arthur Lang, Clerk.

Entered Court Journal No. C-2, page No. 238.

O. K.—Maurice D. Leehey, E. E. Ritchie. [46]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff and Plaintiff in Error,

vs.

A. H. FINLAISON,

Defendant and Defendant in Error.

Order Settling Bill of Exceptions.

It is ordered that the foregoing bill of exceptions consisting of copies of the amended complaint, an-

swer, motion to strike from answer, minute order denying motion to strike from answer, Plaintiff's Exhibit "B," reply, judgment, order extending time for settling and filing bill of exceptions, reporter's transcript of record, and assignments of error, be and the same is hereby settled as the bill of exceptions on writ of error in this cause.

Signed in open court at Seward, Alaska, this 15th day of October, 1914.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Oct. 15, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal S-1, page 320. [47]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff and Plaintiff in Error,

vs.

A. H. FINLAISON,

Defendant and Defendant in Error.

Assignment of Errors.

Now comes the plaintiff, Archie A. Cloninger, and files the following assignment of errors, upon which he will rely in the prosecution of his writ of error in this cause.

FIRST.

The Court erred in denying plaintiff's motion to

strike from defendant's answer, on the ground that the same was irrelevant and did not constitute a defense to plaintiff's amended complaint, the following portions of said answer, to wit:

All of paragraph two, and all of paragraph three following the words "The White River Precinct and Recording District of Alaska," contained in the tenth and eleventh lines of said paragraph three.

SECOND.

The Court erred in excluding from the evidence in the case, over the objection of plaintiff, the certificate of plaintiff's location of the ground in controversy and of his performance of the location work thereon required by law, filed by plaintiff in the recorder's office of the White River Precinct, and offered by him in evidence, to which ruling of the Court plaintiff then and there excepted and the exception was by the Court duly allowed.

THIRD.

The Court erred in excluding and striking out from the evidence in the case, over the objection of plaintiff, the certificate of plaintiff's location of the ground in controversy [48] and of his performance of the location work thereon required by law, filed by plaintiff in the recorder's office of White River Precinct, after defendant had made a motion for a nonsuit and a directed verdict in favor of defendant and against the plaintiff, at the conclusion of plaintiff's testimony, said certificate having been previously admitted by the Court as evidence in the case, to which ruling of the Court plaintiff then and there excepted and the exception was by the Court duly allowed.

FOURTH.

The Court erred in granting defendant's motion for a nonsuit at the close of plaintiff's testimony.

FIFTH.

The Court erred in entering judgment in this cause in favor of defendant and against the plaintiff.

Wherefore, plaintiff in error prays that the judgment of the District Court of Alaska, Third Division, may be reversed.

T. J. DONOHOE and
E. E. RITCHIE,

Attorneys for Plaintiff and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[49]

*In the District Court for the Territory of Alaska,
Third Division*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Petition for Writ of Error.

Now comes the plaintiff above named and says: That on the 11th day of April, 1914, in the above-entitled court made and entered a judgment herein against the plaintiff, granting motion of defendants for a nonsuit and adjudging that plaintiff take

nothing by his action, and that his complaint be dismissed, and that defendant have judgment for costs; that in said judgment and in the proceedings had prior thereto, certain errors were committed to the prejudice of plaintiff, all of which more fully appears in the assignment of errors, filed in this petition.

WHEREFORE plaintiff prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the errors so complained of, and that the transcript of the record, testimony, proceedings and papers in this case, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be proper therein.

T. J. DONOHOE and

E. E. RITCHIE,

Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 15, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[50]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Defendant.

vs.

A. H. FINLAISON,

Defendant.

Order Allowing Writ of Error.

On this 24 day of March, 1915, comes Archie A. Cloninger, the above-named plaintiff, and plaintiff, and plaintiff in error herein, by his attorneys of record. And the said plaintiff by his said attorneys of record filed herein and presented to the Court his petition praying for the allowance of a writ of error, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And at the same time and place said plaintiff presented and filed herein his assignment of errors intended to be urged by him.

Now, therefore, in consideration of the premises, the Court being fully advised in the premises, it is

ORDERED, That the aforesaid writ of error be, and the same is, hereby allowed upon said plaintiff giving bond according to law in the sum of five hundred dollars for the costs of appeal, and upon said writ of error.

It is further ordered that a transcript of the record and proceedings and papers in the cause,

duly authenticated, be sent to said United States Circuit Court of Appeals for the Ninth Circuit. [51]

Dated at Valdez, Alaska, this 24 day of March, 1915.

FRED M. BROWN,
District Judge.

[Endorsed as follows]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 24, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. Entered Court Journal No. 9, page No. 34. [52]

*In the District Court for the Territory of Alaska,
Third Division.*

C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Archie A. Cloninger, as principal, and H. T. Whitley and Edwin Eckern, as sureties, are hereby held and firmly bound to A. H. Finlaison, respondent, upon this writ of error, in the sum of five hundred dollars (\$500.00), lawful money of the United States, to be paid to the aforesaid A. H. Finlaison, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally, firmly by these presents.

Dated this 24th day of March, 1915.

WHEREAS, Archie A. Cloninger, the above-named plaintiff, lately at a session of the District Court for the Territory of Alaska, Third Division, in said court, between Archie A. Cloninger, plaintiff, and A. H. Finlaison, defendant, judgment was rendered against said plaintiff and in favor of said defendant, and the said plaintiff, Archie A. Cloninger, having obtained from said Court an order allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the aforesaid action, and a citation, directed to A. H. Finlaison, is about to be issued, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in San Francisco, California. [53]

Now, the condition of the above obligation is such, that if the said plaintiff, Archie A. Cloninger,, above named, shall prosecute his said writ of error to effect, and shall answer all damages and costs that may be awarded against him, if he fails to make his plea good, then this obligation is to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 24th day of March, 1915.

ARCHIE A. CLONINGER, (Seal)

Principal.

By T. J. DONOHOE, (Seal)

His Attorney of Record.

H. T. WHITLEY, (Seal)

Surety,

EDWIN ECKERN, (Seal)

Surety,

The sufficiency of the foregoing sureties on the foregoing bond and the bond itself is approved this 24 day of March, 1915.

FRED M. BROWN,
District Judge.

Filed in the District Court, Territory of Alaska,
Third Division. Mar. 24, 1915. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy. [54]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Writ of Error.

The President of the United States of America, To
the Honorable FRED M. BROWN, Judge of
the District Court for the Territory of Alaska,
Third Division, Greeting:

Because in the record and proceedings, as also in
the rendition of judgment, which is in the District
Court before you, between Archie A. Cloninger, the
original plaintiff and plaintiff in error, and A. H.
Finlaison, the original defendant and defendant in
error, manifest error hath happened to the damage
of Archie A. Cloninger, the plaintiff in error, as is
said and appears by the petition herein:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that you under your seal, distinctly and openly, send the record and proceedings aforesaid with all things concerning the same to the justices of the *United Circuit* Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at said place in said circuit on the 11th day of April, 1915, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein [55] to correct those errors what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 24th day of March, in the year of our Lord, one thousand nine hundred and fifteen.

[Seal]

ARTHUR LANG,
Clerk.

Allowed by:

FRED M. BROWN,
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

Filed in the District Court, Territory of Alaska, Third Division. Mar. 24, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, Page No. 33. [56]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Writ of Error (Copy).

The President of the United States of America, To
the Honorable FRED M. BROWN, Judge of the
District Court for the Territory of Alaska,
Third Division, Greeting:

Because in the record and proceedings, as also in
the rendition of judgment, which is in the District
Court before you, between Archie A. Cloninger, the
original plaintiff and plaintiff in error, and A. H.
Finlaison, the original defendant and defendant in
error, manifest error hath happened to the damage
of Archie A. Cloninger, the plaintiff in error, as is
said and appears by the petition herein:

We being willing that the error, if any hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid in this behalf, do com-
mand you, if judgment be therein given, that you
under your seal, distinctly and openly, send the rec-
ord and proceedings aforesaid with all things con-
cerning the same to the justices of the *United Cir-
cuit* Court of Appeals, for the Ninth Circuit, in
the City of San Francisco, in the State of California,

together with this writ, so as to have the same at said place in said circuit on the 11th day of April, 1915, that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein [57] to correct those errors what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 24th day of March, in the year of our Lord, one thousand nine hundred and fifteen.

[Seal]

ARTHUR LANG,
Clerk.

Allowed by:

FRED M. BROWN,
Presiding Judge in the District Court, for the Territory and District of Alaska, Third Division.

[Endorsed as follows]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 24, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, Page No. 33. [58]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Citation on Writ of Error [Original].

The United States of America,—ss.

The United States of America, to A. H. Finlaison
and Maurice D. Leehey and J. J. Finnegan, his
attorneys of record, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the city of
San Francisco, in the State of California, within
thirty days from the date of this writ, pursuant to
a writ of error filed in the clerk's office of the Dis-
trict Court for the Territory of Alaska, Third Divi-
sion, wherein Archie A. Cloninger, the above-named
plaintiff, is appellant, and you are respondent and
appellee, to show cause, if any there be, why the
judgment in said appeal mentioned should not be
corrected and speedy justice should not be done to
the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS
WHITE, Chief Justice of the Supreme Court of
the United States of America, this 24th day of
March, in the year of our Lord one thousand nine
hundred and fifteen.

FRED. M. BROWN,
Judge of the District Court for the Territory of
Alaska, Third Division.

[Seal] Attest: ARTHUR LANG,
Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Mar. 24, 1915. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, Page No. 34. [59]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Citation on Writ of Error [Copy].

The United States of America—ss.

The United States of America, to A. H. Finlaison
and Maurice D. Leehey and J. J. Finnegan, His
Attorneys of Record, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Archie A. Cloninger, the above-named plaintiff, is appellant, and you are respondent and appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 24th day of

March, in the year of our Lord one thousand nine hundred and fifteen.

FRED M. BROWN,
Judge of the District Court for the Territory of
Alaska, Third Division.

Attest: ARTHUR LANG,
Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Mar. 24, 1915. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, Page No. 34. [60]

*In the District Court of the Territory of Alaska,
Division No. 3.*

No. —

ARCHIE A. CLONINGER,

Plaintiff,

vs.

FRANK W. PURDY,

Defendant.

**[Acknowledgment of Service of Bill of Exceptions,
Waiver of (Citation and) Notice of Appeal.]**

The undersigned attorney for the defendant
Purdy hereby acknowledges due service of the Bill
of Exceptions heretofore settled and filed herein, and
hereby waives citation and notice of appeal.

Dated at Seattle, Washington, March 13th, 1915.

MAURICE D. LEEHEY,
Attorney for Defendant.

Filed in the District Court, Territory of Alaska,

Third Division. Mar. 24, 1915. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy. [61]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, a copy of the record in the above-entitled cause as a return to the writ of error heretofore sued out of said Circuit Court of Appeals to review the judgment in said cause, consisting of the following files and records and proceedings, in said cause:

1st. Amended Complaint.

2nd. Answer.

3d. Motion to Strike from Answer.

4th. Minute Order Denying Motion to Strike from
Answer.

5th. Reply.

6th. Reporter's Transcript of Record.

7th. Plaintiff's Exhibit "B."

8th. Judgment.

- 9th. Order Extending Time for Settling and Filing Bill of Exceptions.
- 10th. Order Settling and Allowing Bill of Exceptions.
- 11th. Assignment of Errors.
- 12th. Petition for Writ of Error.
- 13th. Order Allowing Writ of Error.
- 14th. Bond for Cost on Writ of Error. [62]
- 15th. Writ of Error and Copy.
- 16th. Citation on Writ of Error and Copy of Citation.
- 17th. Waiver of Service of Citation and Notice of Appeal.
- 18th. This Praecipe.

T. J. DONOHOE and
E. E. RITCHIE,
Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska,
Third Division. Mar. 24, 1915. Arthur Lang,
Clerk. By T. P. Geraghty, Deputy. [63]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C-75.

ARCHIE A. CLONINGER,

Plaintiff,

vs.

A. H. FINLAISON,

Defendant.

United States of America
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 64 pages, numbered from 1 to 64, inclusive, are a full, true and correct transcript of the records and files on the proceedings in the above-entitled cause, as the same appears of record and on file in my office.

That this transcript is made in accordance with the plaintiff's and appellant's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me, and that the cost of such preparation, examination and certificate, amounting to \$15.00 was paid to me by T. J. Donohoe and E. E. Ritchie, attorneys for the plaintiff and plaintiff in error, Archie A. Cloninger.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this —— day of March, A. D., 1915.

ARTHUR LANG,

Clerk of the District Court for the Territory of
Alaska, Third Division. [64]

[Endorsed]: No. 2595. United States Circuit Court of Appeals for the Ninth Circuit. Archie A. Cloninger, Plaintiff in Error, vs. A. H. Finlaison, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed April 1, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

17
No. 2595

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ARCHIE A. CLONINGER,

Plaintiff in Error,

VS.

A. H. FINLAISON,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

T. C. WEST,

T. J. DONOHUE,

E. E. RITCHIE,

O. A. TUCKER,

Attorneys for Plaintiff in Error.

Filed this.....day of December, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2595

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARCHIE A. CLONINGER,

Plaintiff in Error,

VS.

A. H. FINLAISON,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action to determine the ownership of a placer mining claim in the Chisana, commonly known as the Sushanna, district of Alaska. Plaintiff in error was plaintiff and defendant in error was defendant in the district court of Alaska.

Plaintiff made his location of the disputed ground on August 2, 1913. It is admitted that he sufficiently marked his claim upon the ground on that day (T. of R. p. 25). Within the time then required by territorial statute he did \$100 worth of location work on the claim. This also is admitted (T. of R. p. 27). He also filed a certificate of location and location work required by the territorial law of

1913. The court first admitted this certificate in evidence and afterward ruled it out on the ground that it did not meet the requirements of law.

Defendant's claim to the ground was based on a location made for him by A. M. Taylor as attorney in fact on July 3, 1913. Plaintiff admitted that he found a location notice—Finlaison by Taylor, attorney in fact, on August 1. Also corner stakes unmarked. He testified that he examined the official records that night and they contained no power of attorney from Finlaison to Taylor. He located the ground next day. Defendant pleaded that his power of attorney was filed July 12, 1913, with a mining district recorder elected by the miners, and on July 25, 1913, with the precinct recorder. As the court granted a nonsuit no evidence for defendant was taken.

The pleadings raise the issue of the sufficiency of a location by power of attorney before the instrument is recorded in some precinct of the judicial division wherein the claim is situated, under the act of Congress of August 1, 1912, but that issue was not reached in the trial except by plaintiff's admission that he found defendant's notice of location on the ground. At the close of plaintiff's case, on motion of defendant's counsel, the court granted a nonsuit on the ground that plaintiff admitted defendant's location by admitting that he saw the notice of location by attorney on the ground. The court, in granting the nonsuit, laid down the rule

that the law of 1912 did not require the power of attorney to be of record before location was made under it (T. of R. pp. 40-41). Judgment was entered for the defendant and plaintiff sued out this writ of error.

Assignments of Error.

Plaintiff assigns the following errors upon which he will rely in prosecuting this writ:

FIRST.

The court erred in denying plaintiff's motion to strike from defendant's answer, on the ground that the same was irrelevant and did not constitute a defense to plaintiff's amended complaint, the following portions of said answer, to wit:

All of paragraph two, and all of paragraph three following the words "The White River Precinct and Recording District of Alaska," contained in the tenth and eleventh lines of said paragraph three.

SECOND.

The court erred in excluding from the evidence in the case, over the objection of plaintiff, the certificate of plaintiff's location of the ground in controversy and of his performance of the location work thereon required by law, filed by plaintiff in the recorder's office of White River precinct, and offered by him in evidence, to which ruling of the

court plaintiff then and there excepted and the exception was by the court duly allowed.

THIRD.

The court erred in excluding and striking out from the evidence in the case, over the objection of plaintiff, the certificate of plaintiff's location of the ground in controversy and of his performance of the location work thereon required by law, filed by plaintiff in the recorder's office of White River precinct, after defendant had made a motion for a nonsuit and a directed verdict in favor of defendant and against the plaintiff, at the conclusion of plaintiff's testimony, said certificate having been previously admitted by the court as evidence in the case, to which ruling of the court plaintiff then and there excepted and the exception was by the court duly allowed.

FOURTH.

The court erred in granting defendant's motion for a nonsuit at the close of plaintiff's testimony.

FIFTH.

The court erred in entering judgment in this cause in favor of defendant and against the plaintiff.

Argument.

The first and fourth assignments of error raise the issue involved in the construction to be placed upon the act of Congress of August 1, 1912, limiting

and regulating locations of placer claims in Alaska by power of attorney. The first assignment alleges error by the court in refusing to strike from defendant's answer to plaintiff's amended complaint a part of the affirmative defense. The congressional act in question contains the following requirement governing locations by power of attorney:

"That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act."

In the affirmative defense of his answer defendant made the following allegations, with the undoubted purpose of evading forfeiture of his claim because of failure of his agent to comply with the requirements of law just quoted. Plaintiff moved to strike these allegations on the ground that they did not constitute a defense:

"II.

"That this court, by its order herein entered on May 7th, 1913, created the White River

Precinct and Recording District of Alaska, including therein the region wherein such location was made and where the ground in controversy in this action is situated; that a Recorder was appointed for said District, but the exact location of the recording office therein was not designated; that the district so created included practically all of that portion of the Third Judicial Division of Alaska which lies north and east of the summit of the Alaska Range of mountains; that there are no towns whatever situated within said District; and no roads or established trails whatever into or across the same; that the region was wholly inaccessible during the summer months after May 7th, 1913, except by means of poling boats on the larger rivers, and thence across a mountainous and uninhabited country, where no regular lines of travel or communication were established; that said District is so situated that communication with its various parts is impossible except at irregular intervals of weeks and months; that the recorder appointed for said District did not arrive therein and no recording office was established therein until on or about July 25th, 1913."

III.

Paragraph III avers that Andrew M. Taylor came into the White River district—date not mentioned—with a power of attorney from defendant authorizing said Taylor to locate placer claims in Alaska for defendant. The motion to strike included the further allegation that said Taylor came into the White River district carrying said power of attorney

“with the intention in good faith of promptly recording the same there upon his arrival, but was prevented from doing so by the delay in the arrival of the recorder, and the consequent delay in establishing a recording office in said district; that it was impossible to record said Power of Attorney in any other recording office in the Third Judicial Division of Alaska without making a trip involving great expense and the loss of at least two months’ times during the most valuable season for prospecting, and the said Taylor was dissuaded from attempting to record such power of attorney elsewhere by reason of the fact that such recording district had been duly created, and a recorder duly appointed, and the said Taylor had reason to believe that such recording office would be promptly established at some convenient place within said District”.

Counsel for plaintiff urge that the portions of said answer just quoted are wholly irrelevant to any valid issue in the case for the reason that they merely offer excuses for not complying with the requirements of law. In a vast territorial expanse like Alaska, with a sparse population, travel is generally difficult and slow, and recording offices are often remote from regions which prospectors desire to explore. Prospecting has often been done in Alaska two or three hundred miles from the recording office of the precinct, but nobody ever contended outside of this case, so far as the writers of this brief know, that remoteness of a recorder’s office excused failure to file instruments required by law to be recorded in order to affect other persons. Instances are numerous of miners who were

unable to file liens to secure their wages because they could not reach the recording office within thirty days, but no court in Alaska has ever assumed legislative authority to extend the statutory time. If Taylor was unable to record his power of attorney in the third division of Alaska before it became desirable to locate a claim for defendant that was one of the handicaps he incurred by entering the pathless wilderness he so plaintively describes, to locate placer claims for gentlemen who remained snugly at home, or at least it was a handicap to the principal. Mr. Taylor was able to locate two claims for himself each month after his arrival. His burden of sorrow was that he could not annex as much more land by the elastic reach of a power of attorney without skipping a statutory cog and he asks the courts to overlook the skip.

Plaintiff contends here, as in the trial court, that the plain meaning of the law of 1912 quoted above requires a power of attorney to be recorded before a location is made based upon it. True, the statute does not say "before" but it does say a location cannot be made *unless* such power of attorney is recorded, and proceeds to say, after stating the requirement of recording, that *any person so authorized* may locate for another. Multiplication of words could scarcely indicate more forcefully the intent of the law.

In any case the parts of the answer objected to should have been stricken, because if the law does not require recording of the power of attorney to

precede location it could not concern the court why it was not done.

The motion to strike was not waived by proceeding with the case after it was denied, since the motion was based upon the ground that the averments objected to did not state facts valid to a pleading, and objection on that ground is never waived.

More serious still, in the opinion of plaintiff's counsel, was the court's error in granting defendant's motion for a nonsuit. This is best shown by repeating the language of the court in so ruling:

"In this case the plaintiff admits he went on this ground and found a notice of location and found the stakes on the ground and as I have held in all these cases where the question has arisen, it was not the purpose of the Wickersham act to require the recording of the power of attorney prior to the initial step or the first step in making the location. I do not believe in this case it is incumbent upon the defendant to go any further and I believe the motion ought to be granted and the motion will be granted."

At the time this ruling was made there was no evidence before the court showing or tending to show that defendant's power of attorney to Taylor had ever been recorded. The only testimony on that issue was the statement of plaintiff that he and the deputy recorder examined the record book on the evening of August 1, 1913, and the alleged power of attorney did not appear in it. So far as the record shows, outside the allegations of de-

fendant's answer, the power of attorney was not of record when the court granted the nonsuit at the trial in April, 1914. If the trial court's view of the law of 1912 is the correct construction the time for so deciding could not arise in this case until defendant proved that the power of attorney to Taylor was of record before plaintiff attempted to locate the ground. Plaintiff's admission that he saw the notice of location, Finlaison by Taylor, attorney in fact, was not an admission that the power of attorney was recorded.

PLAINTIFF'S CERTIFICATE OF LOCATION AND WORK.

The second and third assignments allege error by the court in excluding from evidence plaintiff's certificate of location and location work, required by the territorial law of 1913, which went into effect four days before plaintiff's location. The court admitted it and afterward struck it out. The record shows the following:

By the COURT. "This notice is open to some criticism. * * * I think it substantially complies with the essential requirements of the statute and the objection will be overruled" (T. of R. p. 27).

Defendant's motion for a nonsuit asked also for a directed verdict for defendant. After stating that the motion for a nonsuit was granted the court added: "The jury will be instructed to bring in a verdict in favor of the defendant." Further proceedings are thus reported:

Mr. RITCHIE. "We save an exception to the order of the court granting the motion for a non-suit and we also except to the order directing the jury to bring in a verdict, for the reason that if the nonsuit is granted there is no room left for a directed verdict. The motion for a nonsuit, I take it, disposes of the case and no verdict is necessary."

By the COURT. "I am not clear upon this matter. We don't want to make any mistake about this part of it. You had better take the time to look into it and see that the proper course is followed."

* * * * *

By the COURT. "I am satisfied on the record made that there is no use proceeding any further; that the plaintiff has not sustained the cause of action. The ground was not open, unappropriated ground at the time on the statements and admissions of the plaintiff himself, but I will take until two o'clock to inquire into the matter and I should like to have counsel do so also."

Afternoon Session.

By the COURT. "In this case of Cloninger versus Finlaison I have found since the adjournment this morning that it is necessary to modify the ruling I have made. * * * Now I believe that this Exhibit B, which is the declaratory statement or verified notice of location, does not conform to the requirements of the statute. * * * I feel that it is right to rule in this case that this notice of placer location, Plaintiff's Exhibit B, which was objected to at the time by the attorney for the defendant, be excluded and the objection will be sustained. That will be the order."

Mr. DONOHUE. "We desire an exception to the ruling of the court." (Exception allowed.) (T. of R. p. 42).

Exhibit B, which is a copy of the certificate in question, is found on page of the record in this case. The territorial statute requiring it to be made stipulated for the following:

“Sec. 10. Within ninety days after discovery the locator shall record with the recorder of the precinct wherein the claim is situate, a certificate of location. Such certificate shall contain:

- (a) The name or number of the claim;
- (b) The name of the locator or locators;
- (c) The date of discovery and posting of the location notice;
- (d) Number of feet in length and width claimed.

Such certificate shall also set forth a description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; a description of the boundaries, corner monuments and markings thereon, and a description of the location work and the place where the same has been performed. Such certificate of location shall not be accepted for record unless the same be verified, before the recorder of the precinct or some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one or by the authorized agent, having personal knowledge of the facts required to be stated therein.”

Sessions Laws of Alaska 1913, pp. 290-291.

It is needless to remind this court that prospectors' notices have always been construed with the extreme of liberality by all courts, for the obvious reason that prospectors are usually men of little education. Apparent good faith and an hon-

est effort to comply with the law is all that any court has ever required in a notice where discovery and necessary marking on the ground were shown. Both are admitted in this case, as already stated.

It seems hardly necessary to suggest to the court that the territorial law of 1913 made it necessary for a prospector to be also a fair lawyer and at least an amateur surveyor. So drastic were its requirements that the legislature of 1915 abrogated the certificate requirement just given.

If any authority is needed for the assertion that a prospector's notice is not held to strict compliance with statute it is found in Lindley on Mines, Vol. II, sec. 381, and cases there cited.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

T. C. WEST,

T. J. DONOHUE,

E. E. RITCHIE,

O. A. TUCKER,

Attorneys for Plaintiff in Error.

No. 2595.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARCHIE A. CLONINGER,
Plaintiff in Error,

vs.

A. H. FINLAISON,
Defendant in Error.

Writ of Error to the District Court of the Territory
of Alaska, Third Division.

HON. FRED M. BROWN, *Judge.*

BRIEF FOR DEFENDANT IN ERROR.

MAURICE D. LEEHEY,
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1102 Alaska Building,
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LYONS & ORTON,
Of Counsel.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARCHIE A. CLONINGER,	}	No. 2595.
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A. H. FINLAISON,		
<i>Defendant in Error.</i>		

Writ of Error to the District Court of the Territory
of Alaska, Third Division.

BRIEF FOR DEFENDANT IN ERROR.

Service has not yet been made of the brief for plaintiff in error. Counsel for the defendant in error therefore reserve the right to file a supplemental brief later, but deem it necessary to submit this argument at this time.

STATEMENT OF FACTS.

The court records show that the White River Recording District was created by order entered

May 13th, 1913, and H. E. Morgan appointed Recorder. The plaintiff Cloninger was at Chitina, Alaska, in the following July when that little town was filled with excitement over the Shushana strike. Stories were current that claims were being staked in the Shushana by powers of attorney, and it was known that such powers of attorney were not of record in the district because the Recorder had not yet arrived there. Cloninger was not a miner, and had never even been in a mining camp. Indeed, he had been in Alaska but eight months at the time. However, he and his partner Maddox were grub-staked and outfitted, and they left for the Shushana, arriving there July 30th. They went there hoping to find some good claims covered by invalid locations attempted through unrecorded powers of attorney. The testimony of Cloninger recites these facts. (Record, pp. 20-26.) That testimony and his cross-examination (Record, pp. 28-36) shows that Cloninger was not prospecting but hunting for claims located by power of attorney. Arriving on July 30th they were on the ground in controversy on the morning of August 1st, and saw the defendant's notice of location and stakes. They observed that the claim was located by power of attorney. That was just what they were looking

for, so they went to the recording office and their examination resulted in their return to the ground on the next day, when plaintiff made his attempted location (Record, pp. 23-24). Later he recorded his alleged notice of location, in evidence as plaintiff's Exhibit B (Record, pp. 45-46). The only discovery alleged by the plaintiff is stated in his own testimony (Record, p. 23).

“Q. What did you do that day on the ground, anything? The first day of August?

A. Why, I panned a little along the creek there.

Q. Did you find anything as the result of your panning?

A. Yes, I found some colors, just very light colors.

Q. Did you pan more than one pan?

A. Yes, I panned several pans.

Q. What did you find, each time about the same?

A. About the same; once or twice I was skunked.”

That is the only testimony in the record concerning any discovery made by the plaintiff in error. He then brought this action in ejectment against the defendant for possession of the ground. The trial resulted in a judgment of non-suit (Record, pp. 40-44).

THE JUDGMENT FOR NON-SUIT SHOULD BE SUSTAINED.

And for several reasons. We shall urge especially, (1) that there was no discovery, and (2) that the recorded notice of location is not a sufficient compliance with the laws of Alaska in force at the time.

ARGUMENT AS TO DISCOVERY.

We have copied the only evidence in the record as to any discovery claimed by the plaintiff in error. He says that he "found some colors, just very light colors." He "panned several pans" and found each time "about the same; once or twice I was skunked."

There is no testimony to the effect that the indications of placer gold were such as would justify a prudent man in spending any time or money in development. Indeed, he does not even testify that he found gold, just "colors," whatever that may mean, and he qualified that by adding "just very light colors." We presume he found the same in the creek, as he says he "panned a little along the creek there," but he does not say whether he reached bed-rock, or saw any bed-rock, or whether he obtained the colors in the gravel or in the muck or tundra. He says nothing about mineral

indications in the vicinity. There is no testimony that any mining had been done anywhere along that creek or indeed anywhere in the vicinity. The entire testimony is summed up in the statement that he joined in the rush to the Shushana and found "just very light colors" on a creek about five miles from Little Eldorado where James was sluicing (Record, p. 29). Yes, the testimony also shows that the plaintiff and his partner "jumped" two or three other claims already located by power of attorney (Record, pp. 33-34), and particularly that the plaintiff made the location of the ground in controversy, assuming the defendant's prior location of the same to be invalid because his power of attorney was not recorded prior to the staking of the ground (Record, p. 31).

There is absolutely no testimony to show that plaintiff in error discovered anything which would justify a prudent man in spending time and money in its development. True, he saw the notice and stakes of the defendant in error, and knew that the ground was already located for placer, but the mere fact that this is a contest between mineral claimants does not relieve plaintiff of the necessity of proving a discovery. We quote from Justice

Brewer *in re Chrisman vs. Miller*, 197 U. S. 313, 49 L. Ed. 770, 25 Sup. Ct. Rep. at 471:

“It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious metal, or, if it be claimed as placer ground, that it is valuable for such mining.”

In that case the U. S. Supreme Court affirmed the Supreme Court of California in holding that seepages of oil and other indications of petroleum did not constitute a sufficient discovery of mineral to support the location.

In *Charlton vs. Kelly*, 156 Fed. 433, at 436, Judge Gilbert states that

“there must have been such a discovery of gold as to give reasonable evidence that the

ground is valuable for placer mining, taking into consideration its character, location and surroundings.”

And continuing, this court refers to *Chrisman vs. Miller, supra*, wherein Justice Brewer quoted with approval the language of Justice Field in an opinion in *re Iron Silver Mining Co. vs. M. & S. G. & S. Mining Co.*, 143 U. S. 394, 36, L. D. 201, 12 Sup. Ct. Rep. 543.

This court also, in the Alaska case of *Lange vs. Robinson*, 148 Fed. 799, considered and discussed the subject exhaustively. It is true that the judgment of non-suit in that case was reversed, and the case remanded for a new trial, although the only testimony as to an actual discovery of gold in the ground was that the locator “found in the several washings from two to six fine colors of gold.” Even that was much more than the plaintiff Cloninger found. Indeed, he does not even claim to have found gold at all, but in *re Lange vs. Robinson*, this court says at page 804:

“There was an actual discovery of gold upon each of the claims located. They are situated near other lands presenting the same surface indications, which at the date of the location of these claims were known to be valuable for the placer gold which they con-

tained; and these facts, according to the uncontradicted testimony of the plaintiff and that of the witness Field, above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration, with the reasonable expectation that, when developed, they would be found valuable as placer mining claims. This was in our opinion all that was necessary.”

In this case no actual discovery is shown, unless the “colors” found by Cloninger are to be treated as an actual discovery of gold. None of the other surrounding conditions recited in the Lange opinion are shown by the testimony in this case.

What constitutes a sufficient placer discovery has been so many times and so ably argued and fully considered by this court that we will not burden this brief with a further citation of authorities. We submit that the numerous decisions of this court in Alaska cases abundantly support the contention of the defendant in error that in this case the testimony does not show a sufficient discovery.

ARGUMENT AS TO THE RECORDED NOTICE OF LOCATION.

The law of Alaska relating to mining locations in force on the date of Cloninger’s alleged location is contained in the act of the Legislature of Alaska

approved April 30th, 1913. For the convenience of the court we copy Sections 13-18 incl. of that act from the Session Laws of 1913, pp. 289-291:

“Sec. 13. Any person who discovers upon the public domain of the United States, within the Territory of Alaska, a placer deposit of gold, or other deposit of mineral having a commercial value, which is subject to entry and patent under the mining law of the United States, may, if qualified by the laws of the United States, locate a mining claim upon such deposit in the following manner:

Sec. 14. He must at the time of discovery post conspicuously at the point of discovery, a notice of location thereof, containing (a) the name or number of the claim; (b) the name of the locator or locators; (c) the date of discovery and posting of notice as in this section provided for; (d) the number of feet in length and width claimed; the notice herein described shall be known as the location notice.

Sec. 15. At the time of posting the notice of location, he shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes or posts not less than three feet high above the ground and three inches in diameter and hewed on the side or sides facing the claim, or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high. Whatever monument is used it must be marked with

the name or number of the claim and the designation of the corner by number, and the monument nearest the discovery shall be the initial post, stake, or monument and shall be post, stake or monument number one; and further the corners shall be numbered in regular rotation. If the claim is located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees be marked or blazed along the lines of such claim to indicate the location of such lines. If located in an open country the boundary lines shall be marked by placing line stakes or line monuments so as to readily lead from corner to corner of such claim.

Sec. 16. Within ninety days from the date of discovery, and prior to the filing of the certificate of location as provided in the following section, the locator or locators shall perform labor upon such claim in developing the same to an amount which shall be equivalent in the aggregate to one hundred dollars' worth of such work for each twenty acres or fractional part thereof contained in such claim, and such work shall be known and shall constitute "location work."

Sec. 16½. Nothing in this act shall be held to apply to lands located under the laws of the United States as placer claims for the purpose of the development of petroleum and natural gas and other natural oil products.

Sec. 17. Within ninety days after the discovery the locator shall record with the re-

corder of the precinct wherein such claim is situate, a certificate of location. Such certificate shall contain:

- (a) The name or number of the claim;
- (b) The name of the locator or locators;
- (c) The date of discovery and posting of the location notice;
- (d) Number of feet in length and width claimed.

Such certificate shall also set forth a description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; a description of the boundaries, corner monuments and markings thereon, and a description of the location work and the place where the same has been performed. Such certificate of location shall not be accepted for record by the precinct recorder unless the same be verified, before the recorder of the precinct or some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one, or by the authorized agent, having personal knowledge of the facts required to be stated therein. For such verification and the execution of the certificate thereof the precinct recorder or other officer taking and executing the same shall charge a fee of not more than fifty cents. A certificate of location so verified, or a certified copy thereof, shall be *prima facie* evidence of all the facts properly recited therein.

Sec. 18. If the discoverer of any placer deposit fail to comply with any of the provisions

of Sections 14, 15, 16 and 17, within the time therefor specified, all right to appropriate any portion of the public domain, acquired by him by reason of his discovery, shall cease, and any placer mining claim attempted to be located in violation of Sections 12 $\frac{1}{4}$, 12 $\frac{1}{2}$ and 12 $\frac{3}{4}$, or any of them, shall be null and void, and the area thereof may be located by any qualified locator as if no such previous attempt had ever been made."

The only compliance with that law, as to record of notice of location and proofs of labor, is shown in the documents in evidence as Plaintiff's Exhibit B (Record, pp. 45-46). The two documents were separately recorded, but on the same date, in the following language:

"NOTICE OF PLACER LOCATION.

Notice is hereby given that the undersigned, a citizen of the United States, has on this 2nd day of August, 1913, discovered at the place where this notice is posted a valuable placer deposit bearing gold, and I do hereby locate and claim the same as No. 1 Bear Creek placer mining claim. This claim is situated in the White River Mining District, Territory of Alaska.

The point of discovery whereon this notice is posted is situated close to initial post or monument. Bear Creek is tributary to Big Eldorado, and from thence the boundaries of

said claim are marked as follows:

(Initial Post.)

I claim 1,320 ft. up stream from this post and 330 ft. each side of this post (20 acres). The boundary of this claim is marked by 4 corner posts and 2 center posts. The 4 corner posts are willow posts and centers are rock monuments.

Notice dated and posted on the date aforesaid.

ARCHIE A. CLONINGER,
Locator and Claimant.

Filed by A. Cloninger at 11 a. m., Aug. 16, 1913.

H. E. MORGAN, Recorder.

By M. R. HEALY, Deputy. \$2.00.

PROOF OF LABOR.

White River Recording Office.

August 16, 1913.

I, the undersigned, hereby certify that I have done more than One Hundred Dollars' worth of labor and improvements on the No. 1 Bear Creek Placer Claim, which consists of Open Cut $4\frac{1}{2}'$ by $3'$ by 40 feet, and was done in ten eight-hour days.

ARCHIE A. CLONINGER.

Subscribed and sworn to before me this 16th days of August, 1913.

HORATIO E. MORGAN,
Notary Public.

Filed for record by A. Cloninger at 11 a. m., Aug. 16, 1913. H. E. Morgan, Recorder. By M. R. Healy, Deputy. Seal, \$3.00."

We submit that the trial court was compelled to hold that these documents are in no sense a compliance with the laws of Alaska. Indeed, they are not even a compliance with the Federal Statute, for while record is not required by the Federal Law, Section 2324 U. S. Rev. Stats. provides that

"All records of mining claims hereafter made shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

This notice is in no sense a compliance with that requirement, and certainly it is not a compliance with the Alaska law. The only reference to a natural object or permanent monument is that the claim may be construed from its name to be situated on Bear Creek, though even that much appears but inferentially. There is absolutely nothing to show on which part of Bear Creek the claim is situated. The creek may be several miles long and the claim located anywhere upon its length. There is not even a reference to any other mining claim. The "description of the boundaries, corner monuments and markings thereon" amounts to

nothing further than that the claim is "1,320 ft. up stream from this post and 330 ft. each side of this post." The only description of the markings is that "the 4 corner posts are willow posts, and the centers are rock monuments." Note the Alaska law in Section 15 specifically fixes the size and dimensions of the stakes or monuments, and requires that

"Whatever monument is used, it must be marked with the name or number of the claim and the designation of the corner by number, and the monument nearest the discovery shall be the initial post, stake or monument, and shall be post, stake or monument No. 1; and further the corners shall be numbered in regular rotation."

The recorded notice is lacking in this respect, and although of paramount importance it is also lacking the verification required by law. The proofs of labor were recorded as a separate document, and are verified, but such proofs of labor, or "location work," lacks a description of "the place where the same has been performed," as required by Section 17.

Now we must assume that the Legislature of Alaska meant something when it enacted the law of 1913. It was profiting by the experience of other

mining states, and the law is substantially the same as that in force in the State of Montana for many years. Such laws, in Montana and other mining states, have been repeatedly upheld by the state and federal courts, and even by the Supreme Court of the United States in the case of *Butte City Water Co. vs. Baker*, 196 U. S. 119, 49 L. Ed. 409, 25 Sup. Ct. Rep. 213, from which we quote:

“The Montana statute (Montana Codes Annotated, Sec. 3612), among other supplementary regulations, provided that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situated must contain ‘the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims,’ and ‘the location and description of each corner, with the markings thereon.’ A failure to comply with these regulations was the ground upon which the Supreme Court of Montana held the location invalid. It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any Congressional statute; on the contrary are rather suggested by Section 2324. It may well be that the State Legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full

particulars in respect to the discovery shaft and the corner posts should be, at the very beginning, placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when, by subsequent explorations, mining claims of great value have been uncovered.

We see no error in the rulings of the Supreme Court of Montana, and its judgment is affirmed."

The U. S. Supreme Court in that case affirmed the decision of the Supreme Court of Montana in the same case, while the Montana court based its decision on the authority of *Purdum vs. Laddin*, 23 Mont. 387, 59 Pac. 154, from which we quote:

"In granting a new trial, the District Court did not err. Section 3612 of the Political Code provides that within 90 days from the date of posting upon the claim the location notice required by Section 3611, there must be filed with the county clerk a declaratory statement, which must contain, among other things: '7. The location and description of each corner, with the markings thereon.' The statute is mandatory, and substantial compliance with its provisions is necessary to perfect a valid location."

We also deem it worth while to quote the following from the opinion of Judge DeWitt *in re*

McCowan vs. McLay, 16 Mont. 234, 40 Pac. 603:

“The declaratory statement on oath must be of the discovery or location, and not simply of the description of the claim. This language seems to be clear, and the intent seems to be plain. A few lines further in the statute it is also provided that the declaratory statement shall also describe such claim in the manner provided by the laws of the United States. Therefore it appears that the declaratory statement shall be of the discovery or location, as well as the description of the claim, and it would be unreasonable to hold that a person taking oath that the description of a claim was correct was thereby taking oath that all other matters set up in the notice of location or declaratory statement were also true. It therefore follows that the location notice of Yellow Jacket lode, being verified as to only one of its items, was not a declaratory statement on oath of the discovery or location of a claim. It is observed that the affidavit further states that the locators have fully complied with the requirements of law and local customs. This, however, is simply a conclusion of law, stated by the locators, and not a verification of any fact. *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419. We must therefore conclude that plaintiff’s location notice was fatally defective.”

The Montana statute has been upheld as mandatory and the requirements absolute. Later cases to that effect are *Hickey vs. Anaconda C. M. Co.*,

33 Mont. 46, 81 Pac. 806, cited with approval in *Washoe Copper Co. vs. Junila*, 43 Mont. 178, 115 Pac. 918.

This is true of similar requirements in other states, all of which have been upheld as mandatory. We quote the following from *Van Buren vs. McKinley*, 8 Idaho 93, 66 Pac. 937:

“It is contended by counsel for appellant that an affidavit is not necessary to make a valid location; that the law requiring it imposes a condition precedent upon citizens about to locate mining ground not contemplated by the laws of the United States, and in conflict with them, and therefore the state law imposing such condition is absolutely void. Under the provisions of Section 2322, Rev. St. U. S., state, territory and local regulations are authorized to be imposed as a condition precedent to the possession of mining claims, not in conflict with the laws of the United States. Requiring an affidavit to be attached to the location notice of a mining claim as provided by Section 3104, Rev. St., is not in conflict with the provisions of said Section 2322. It is a reasonable regulation that the Legislature is fully authorized to make. *Dunlap v. Pattison* (Idaho), 42 Pac. 504. The Supreme Court of Montana in several cases have held that the statute requiring an affidavit to a location notice of a mining claim was not in contravention of the federal stat-

utes. *McBurney v. Berry*, 5 Pac. 867; *McCowan v. McLay*, 40 Pac. 602; *Berg v. Koegel*, 40 Pac. 605.”

A similar statute was upheld in the State of Washington *in re Knutson vs. Fredlund*, 56 Wash. 634, 106 Pac. 200.

The Alaska law requires several statements which are wholly lacking in the location certificate recorded by the plaintiff in error, notably a description of the claim with reference to some natural object or permanent monument; a description of the boundaries, corner monuments and markings thereon; a description of the place where the location work has been performed, and especially that such recorded notice shall be verified. These requirements in Montana and other states have been uniformly upheld by the courts as mandatory. Surely that must be so in Alaska, especially as Section 18 of the Alaska law specifically provides that if the discoverer fails to comply with any of such provisions “all right to appropriate any portion of the public domain acquired by him by reason of his discovery shall cease.”

We respectfully submit that the alleged location of the plaintiff in error was not based upon any sufficient discovery of placer gold, or upon any

discovery whatever; that there is no testimony in the record showing that he posted the notice of location as required by Section 14 of the Alaska mining law, and certainly the recorded notice wholly fails to comply with the mandatory provisions of the Alaska law. The writ of error should be denied and the judgment of non-suit affirmed.

Respectfully submitted,

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Of Counsel.



